

NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. CURLEY JACOBS AND BRUCE LEE McMILLIAN

No. COA04-541

(Filed 18 October 2005)

1. Appeal and Error— preservation of issues—failure to argue

Assignments of error that were not presented in defendants’ briefs are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Confessions and Incriminating Statements— custodial statement—motion to suppress

The trial court did not err in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by denying defendant’s motion to suppress his custodial statement, because: (1) the trial court was not required to make written findings of fact when there was no material conflict in the evidence of this case; (2) the waiver form signed by defendant on 6 August 2002 indicated that he was willing to make a statement and answer questions and that he did not want a lawyer at that time; (3) defendant failed to introduce any evidence during the suppression hearing tending to show he invoked his right to counsel on 6 August 2002, and if anything, he invoked his right to remain silent regarding an unrelated incident; and (4) law enforcement officials involved in the investigation of the pertinent incident honored defendant’s invocation of his right to remain silent regarding an unrelated incident.

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3. Evidence— prior crimes or bad acts—impersonation of law officers—instruction on limited purpose

The trial court did not abuse its discretion in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by admitting evidence of defendant's prior bad acts including defendant dressing up as a law enforcement officer and robbing another individual at his home two days after the robbery of the victims in this case, because: (1) both incidents involved the assailants' entry into the victim's residence under the auspices of legitimate law enforcement activity, the assailants in both incidents were dressed as law enforcement officers and displayed a search warrant as well as firearms in an effort to gain entry into the respective residences, and the assailants in both incidents bound their victims by using plastic handcuffs once they were inside the home and searched the residence for "illegal" items; and (2) the trial court repeatedly instructed the jury regarding the limited purposes for which the evidence of the unrelated incident could be used.

4. Evidence— prior inconsistent statements—impeachment—refreshing memory with prior custodial statements

The trial court did not err in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by admitting evidence of two coparticipants' prior inconsistent statements when the State impeached the coparticipants with their prior custodial statements after allowing them to refresh their memory by looking through their statements, because: (1) the record demonstrates the coparticipants were testifying contrary to the expectations of the State and there is no indication that the State called the witnesses or used their impeachment as a mere subterfuge to get evidence before the jury which was otherwise inadmissible; and (2) the trial court instructed the jury that when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony, the jury must not consider such earlier statement as evidence of the truth of what was said at the earlier time.

5. Evidence— cross-examination—limitation

The trial court did not err in an impersonation of a law enforcement officer, armed robbery with a dangerous weapon, burglary, and kidnapping case by limiting the cross-examination

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of a State's witness including questions regarding the witness's prior convictions for simple assault and probationary status, and regarding a transcript of plea the witness signed prior to defendant's trial, because: (1) assuming *arguendo* that the trial court erred, defendant is not entitled to a new trial when the witness's testimony focused on his own kidnapping and robbery rather than those charges defendant faced at trial, and another coparticipant provided a similar account of the incident detailing defendant's involvement in it during his testimony; (2) the witness's statement to a detective was admitted into evidence along with his photographic identification of defendant and a coparticipant; (3) defense counsel was allowed to question the witness regarding his current incarceration, his conviction for possession of a firearm on educational property, his conviction for possession of a firearm by a felon, his conviction for driving after consuming an alcoholic beverage, his conviction for resisting a public officer, and his conviction for violating a domestic violence order; and (4) with respect to the plea transcript, although the trial court stated that there was nothing in the papers requiring the witness to testify in this case, the trial court instructed defense counsel that he was allowed to ask the witness if he got some consideration for his testimony.

6. Evidence— codefendants' custodial statement—no powerfully incriminating characteristics

Defendant's right of confrontation was not denied by the trial court's ruling allowing a detective to read the codefendant's custodial statement to the jury, because: (1) the use of the word "we" in the codefendant's redacted statement did not clearly implicate defendant; and (2) the statement did not contain those powerfully incriminating characteristics requiring reversal under the Confrontation Clause.

7. Sentencing— aggravating factors—failure to submit to jury

The trial court erred in an impersonation of a law enforcement officer, robbery with a dangerous weapon, first-degree burglary, and double second-degree kidnapping case by sentencing defendant in the aggravating range without submitting the aggravating factors to the jury for proof beyond a reasonable doubt, and the case is remanded for resentencing.

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8. Indigent Defendants— attorney fees—court-appointed attorney—notice and opportunity to be heard

The trial court erred in imposing attorney fees upon defendant for his court-appointed attorney pursuant to N.C.G.S. § 7A-455, and the case is remanded for a hearing, because while the transcript reveals that attorney fees were discussed following defendant's conviction, there was no indication that defendant was notified of and given an opportunity to be heard regarding his appointed attorney's total hours or the total amount of fees imposed.

9. Criminal Law— prosecutor's argument—not comment on defendants' failure to testify

The prosecutor did not improperly comment on defendants' failure to testify by his statements during his closing argument that the jury "did hear from the defendants" and that "they made statements" where the prosecutor was referring to statements made by defendants following their arrest. Furthermore, the trial court did not err by instructing the jury that defendants were under no obligation to testify during trial.

10. Evidence— codefendant's redacted custodial statement— replacing defendant's name with word "someone"

The trial court committed harmless error, if any at all, in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by allowing the State to introduce a redacted version of the codefendant's custodial statement where defendant's name was replaced with the word "someone," because: (1) assuming *arguendo* that it was improper for the trial court to allow a detective to read the redacted version of the codefendant's statement, defendant is not entitled to a new trial when the State presented overwhelming evidence to establish defendant's guilt notwithstanding the codefendant's statement, including testimony from a victim and a coparticipant which tended to show that defendant entered the victim's residence during the incident and was referred to by the name "Sarge;" and (2) defendant's own statement to law enforcement officers described his involvement in the incident, including his getting out of the car, walking to the house, and telling a coparticipant they needed to go.

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11. Criminal Law— motion to sever trial—unrelated incident

The trial court did not abuse its discretion in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by failing to grant defendant's motion to sever the trial, because defendant was not identified as a participant in any stage of an unrelated incident, and the trial court twice instructed the jury regarding the limited use of the evidence including that it was limited to the codefendant.

12. Kidnapping— second-degree—instruction—plain error analysis

The trial court did not commit plain error by instructing the jury that it could convict defendant of second-degree kidnapping if it found that the victims were restrained "for the purpose of commission of burglary and armed robbery" when the indictment alleged that the victims were restrained "for the purpose of facilitating the commission of . . . robbery" because (1) the trial court's instruction actually added a second crime to the purpose of the restraint thereby placing a higher burden of proof on the State; and (2) compelling evidence supported the additional theory submitted by the trial court, and the jury found defendant guilty of the crime giving rise to it.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by defendants from judgments entered 29 September 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 3 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters and Special Deputy Attorney General Karen E. Long, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by C. Scott Holmes, for defendant-appellant Curley Jacobs.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant Bruce Lee McMillian.

TIMMONS-GOODSON, Judge.

Curley Jacobs ("Jacobs") and Bruce Lee McMillian ("McMillian") (collectively, "defendants") appeal their convictions for impersonation of a law enforcement officer, robbery with a dangerous weapon, first-degree burglary, and two counts of second-degree

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kidnapping. For the reasons discussed herein, we hold that both defendants received a trial free of prejudicial error, but we vacate the trial court's imposition of attorney's fees upon Jacobs and remand his case for resentencing.

The State's evidence presented at trial tends to show the following: In the early morning hours of 30 July 2002, defendants, William Robert Parker ("Parker"), Sharrone Brayboy ("Brayboy"), and George Allen Locklear ("Locklear") drove to a residence in Shannon, North Carolina, owned by Lee Otis Chavis ("Mr. Chavis"). At approximately 1:00 or 1:30 a.m., Mr. Chavis heard a knock at the front door of his residence. When Mr. Chavis opened the door, Parker and Brayboy were standing on the front steps. Parker and Brayboy were dressed in "real thin blazers" that had the letters "DEA" on them, and they both had a "badge" on their belts "like a detective would wear it." Parker and Brayboy informed Mr. Chavis that they were looking for him. Mr. Chavis noticed that Parker was holding a "chrome looking" handgun in his hand. After Mr. Chavis asked to "see the warrant[.]" Brayboy, who was holding a double-barreled shotgun, told Mr. Chavis that if he did not open the door, he would be shot. Parker and Brayboy thereafter entered Mr. Chavis' residence, forced him to the floor of the living room, and bound his hands behind his back with plastic handcuffs. Parker and Brayboy then attempted to subdue Goldie Chavis ("Mrs. Chavis"), Mr. Chavis' wife. Mr. Chavis convinced Parker and Brayboy to allow Mrs. Chavis to use the restroom. Mrs. Chavis thereafter went to her bedroom in an effort to change clothes. After she changed her clothes, Parker and Brayboy bound Mrs. Chavis' hands behind her back and brought her to the living room. Mr. Chavis heard Parker and Brayboy searching the rooms of his residence, and he heard Brayboy "yank[] out all the drawers and all the dressers[.]" Eventually, Parker and Brayboy encountered Mr. Chavis' son, Benson Chavis ("Benson"), in a back bedroom of the residence. Parker and Brayboy bound Benson's hands behind his back and brought him into the living room as well.

As Parker and Brayboy were "tearing up everything in the bedroom[.]" McMillian entered the residence. Parker and Brayboy called McMillian "Sarge," and they informed the Chavises that "they were going to need to talk to him to see what they were going to do" and that "there w[ere] some more guys across the road raiding a house[.]" Parker, Brayboy, and McMillian thereafter left the Chavis residence. After the three men left the area, Benson freed himself from his handcuffs and cut Mr. and Mrs. Chavis' handcuffs. Following a search of

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their residence, the Chavises determined that the three men had taken several firearms and approximately \$1,700.00 in cash.

After leaving the Chavis residence, Parker, Brayboy, and McMillian joined Jacobs and Locklear, who were waiting outside the residence. The five men left in two vehicles, one of which was an older model Chevrolet Caprice that had been used by the Robeson County Sheriff's Department. At a subsequent meeting at Locklear's residence, the five men divided Mr. Chavis' firearms and cash, as well as crystal methamphetamine taken from the Chavis residence.

Robeson County Sheriff's Department Detective Reggie Strickland ("Detective Strickland") was dispatched to the Chavis residence to investigate the incident. The Chavises informed Detective Strickland that their assailants had fled in "a brown-ish, burgundy-ish or older model patrol car[.]" After conversing with several other law enforcement officers, Detective Strickland determined that Brayboy was involved in the incident. Brayboy was arrested on 6 August 2002 and interviewed by Detective Strickland. Following the interview, Detective Strickland arrested Parker at Locklear's residence in Maxton, North Carolina. Statements made by Parker during his interview led Detective Strickland to arrest Jacobs on 8 August 2002. At the time of his arrest, Jacobs was in police custody on another charge. McMillian thereafter contacted law enforcement officials and turned himself in on 12 August 2002.

On 4 November 2002, defendants were indicted separately for first-degree burglary, robbery with a dangerous weapon, impersonating a law enforcement officer, and three counts of second-degree kidnapping. Defendants' cases were thereafter joined, and their case proceeded to trial the week of 22 September 2003. Following the close of the State's evidence, the trial court dismissed both charges of second-degree kidnapping of Benson. On 29 September 2003, the jury found both defendants guilty of first-degree burglary, robbery with a dangerous weapon, impersonating a law enforcement officer, second-degree kidnapping of Mr. Chavis, and second-degree kidnapping of Mrs. Chavis. After making findings of fact in aggravation and mitigation and determining that he had a prior felony record level II, the trial court sentenced Jacobs to a total of 131 to 176 months imprisonment. After making findings of fact in aggravation and mitigation and determining that he had a prior felony record level III, the trial court sentenced McMillian to a total of 109 to 150 months imprisonment. Defendants appeal.

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[1] Although they submitted a joint record on appeal, defendants filed separate briefs with this Court. We note initially that neither defendant provided argument in his brief for all of his original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendants for appeal.

Jacobs' Appeal

The issues in Jacobs' appeal are whether the trial court erred by: (I) denying his motion to suppress his custodial statement; (II) admitting evidence of his prior bad acts; (III) admitting evidence of Parker and Brayboy's prior inconsistent statements; (IV) limiting the cross-examination of a State's witness; (V) admitting McMillian's statement into evidence; (VI) sentencing him in the aggravated range; and (VII) imposing attorney's fees upon him.

I. Motion to Suppress

[2] Jacobs first argues that the trial court erred by denying his motion to suppress his custodial statement. Jacobs asserts that the interrogation giving rise to the statement violated his constitutional rights. We disagree.

In ruling on a motion to suppress a custodial statement, "[t]he trial court makes the initial determination as to whether an accused has waived his right to counsel." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citations omitted), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). N.C. Gen. Stat. § 15A-977(f) (2003) requires the trial court to "set forth in the record [the] findings of fact and conclusions of law" supporting its determination. In the instant case, the record indicates that although the trial court failed to make any written findings and conclusions to support its denial of Jacobs' motion to suppress, the trial court did provide rationale from the bench. Our Supreme Court has previously stated that "[i]f there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact In that event, the necessary findings are implied from the admission of the challenged evidence." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (citations omitted). As there is no material conflict in the evidence of this case, we conclude that the trial court did not err by failing to make written findings of fact and conclusions of law.

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Prior to trial, Jacobs filed a motion to suppress his custodial statement to Detective Strickland, arguing that he had “asserted his right to counsel prior to the interrogation” by Detective Strickland on 8 August 2002. At the suppression hearing, defense counsel questioned Robeson County Sheriff’s Department Lieutenant James Carter (“Lieutenant Carter”) regarding a *Miranda* waiver form signed by Jacobs on 6 August 2002. Lieutenant Carter testified that Jacobs was taken into custody on that date for the alleged armed robbery of another individual, James Morgan (“Morgan”). Lieutenant Carter testified that after he read the *Miranda* warnings to him, Jacobs “signed [the waiver form], and that was the end of it.” Lieutenant Carter elaborated as follows:

Q. He wouldn’t give you a statement?

A. That was the end of it.

Q. Did you ask him to make a statement?

A. Yes, sir, I did, and he didn’t.

Q. He didn’t.

A. That was the end of that.

Q. Now, did you ever question him again after that questioning?

A. No, sir.

Further testimony from the suppression hearing revealed that although Lieutenant Carter did not thereafter question Jacobs regarding the Morgan incident, Detective Strickland did question him regarding the Chavis incident. On cross-examination, Detective Strickland testified that when he questioned Jacobs on 8 August 2002, he was not aware that Jacobs had an attorney appointed to represent him regarding the Morgan incident, but that he “knew [Jacobs] was in jail on other charges not related to” the armed robbery of the Chavises. Detective Strickland acknowledged that he initiated the questioning of Jacobs on 8 August 2002, and he testified that Jacobs willingly waived his *Miranda* rights and confessed to the Chavis incident while in custody for the Morgan incident.

We recognize that the waiver form signed by Jacobs on 6 August 2002 indicated that he was “willing to make a statement and answer questions” and that he “d[id] not want a lawyer at th[at] time.” However, we also recognize that “a criminal defendant who has been advised of and has waived his [Fifth Amendment] rights has the right

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to terminate a custodial interrogation by indicating ‘in any manner, [and] at any time prior to or during questioning, that he wishes to remain silent.’ ” *State v. Murphy*, 342 N.C. 813, 823, 467 S.E.2d 428, 434 (1996) (quoting *Miranda v. Arizona*, 384 U.S. 436, 473-74, 16 L. Ed. 2d 694, 723 (1966)) (alteration in original). Accordingly, we conclude that by refusing to offer a statement to Lieutenant Carter on 6 August 2002, Jacobs invoked his Fifth Amendment rights to avoid custodial interrogation regarding the Morgan incident, notwithstanding his prior waiver of that right. However, we are not convinced that Jacobs’ invocation of his rights to avoid custodial interrogation regarding the Morgan incident impacted Detective Strickland’s subsequent interrogation regarding the Chavis incident.

While the immediate effect of a defendant’s invocation of his or her Fifth Amendment rights is the same regardless of which right is invoked in particular, *see, e.g., Murphy*, 342 N.C. at 823, 467 S.E.2d at 434 (holding that interrogation must immediately cease upon invocation of right to remain silent) and *State v. Morris*, 332 N.C. 600, 610, 422 S.E.2d 578, 584 (1992) (holding that interrogation must immediately cease upon invocation of right to counsel), our Supreme Court has noted that the right to remain silent and the right to counsel “differ[] slightly” in effect, and therefore it has declined to expand the requirements regarding a counsel-based invocation to those instances where the defendant “only” invoked his or her right to remain silent. *Murphy*, 342 N.C. at 823 n.1, 467 S.E.2d at 434 n.1. Where a defendant has invoked his or her Fifth Amendment right to remain silent, the admissibility of statements thereafter obtained “ ‘depends under *Miranda* on whether [the] right to cut off questioning was scrupulously honored.’ ” *Murphy*, 342 N.C. at 823, 467 S.E.2d at 434 (quoting *Michigan v. Mosley*, 423 U.S. 96, 104, 46 L. Ed. 2d 313, 321 (1975)) (quotation marks omitted). However, where a defendant has invoked his or her Fifth Amendment right to counsel, the admissibility of statements thereafter obtained depends upon the voluntariness of the defendant’s subsequent waiver of the right to counsel as well as the presence of counsel during subsequent questioning. *Morris*, 332 N.C. at 610, 422 S.E.2d at 584 (“Once [a law enforcement officer] cease[s] the interrogation, [the law enforcement officer] or his colleagues could only recommence it under two sets of circumstances. The first set of circumstances requires reinitiation of conversation by [the] defendant and a knowing and intelligent waiver of the right to counsel by [the] defendant. . . . The second set of circumstances involves police-initiated interrogation *once counsel is*

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present.”) (citations omitted) (emphasis in original). In the instant case, Jacobs failed to introduce any evidence during the suppression hearing tending to show that he invoked his right to counsel on 6 August 2002. Instead, the uncontradicted testimony indicates that if he invoked either of the Fifth Amendment rights, Jacobs invoked his right to remain silent regarding the Morgan incident.

In *Mosley*, the defendant was arrested for his alleged involvement in a series of robberies and, during questioning regarding the robberies, invoked his Fifth Amendment right to remain silent. Several hours later, a different officer removed the defendant from his cell and, after reading the defendant his *Miranda* rights, questioned the defendant regarding a murder unrelated to the robberies. The defendant thereafter confessed to the murder, and on appeal of his subsequent conviction, he argued that the second interrogation violated his Fifth Amendment rights. The Supreme Court disagreed, concluding that the confession arising from the second interrogation was admissible during the defendant's murder trial because law enforcement officials had “scrupulously honored” the defendant's right to “cut off questioning” regarding the robberies. 423 U.S. at 104, 46 L. Ed. 2d at 321. In support of this conclusion, the Court noted that law enforcement officials “immediately ceased” the initial interrogation after the defendant invoked his right to remain silent, that law enforcement officials attempted no further interrogation until “an interval of more than two hours” had occurred, and that the defendant was provided “full and complete *Miranda* warnings” prior to initiation of the second interrogation, which focused “exclusively on . . . a crime different in nature and in time and place of occurrence” when compared to the initial interrogation. 423 U.S. at 104-05, 46 L. Ed. 2d at 321-22.

In the instant case, uncontradicted evidence introduced during the suppression hearing supports a conclusion that the law enforcement officials involved in the investigation of the Chavis incident “scrupulously honored” Jacobs' invocation of his right to remain silent regarding the Morgan incident. As detailed above, Lieutenant Carter testified that “[t]hat was the end of that” when Jacobs refused to make a statement regarding the Morgan incident, and that he did not thereafter question Jacobs regarding the charges. Detective Strickland testified that he questioned Jacobs regarding the Chavis incident on 8 August 2002, approximately two days after Jacobs was questioned regarding the Morgan incident. Detective Strickland testified further that he issued fresh *Miranda* warnings to Jacobs prior to

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questioning him regarding the Chavis incident. There is no indication that the second interrogation focused on the Morgan incident, which, although similar in nature to the Chavis incident, is nevertheless different “in time and place of occurrence” and not so like the Chavis incident as to outweigh the other factors suggesting that law enforcement officials “scrupulously honored” Jacobs’ Fifth Amendment right to remain silent. Therefore, in light of the foregoing, we conclude that the second interrogation of Jacobs was not unconstitutional under the facts of this case, and the trial court did not err by admitting the statement obtained by law enforcement officials during the interrogation. Accordingly, we overrule Jacobs’ first argument.

II. Evidentiary Issues

[3] Jacobs next argues that the trial court erred by allowing witnesses to testify regarding his prior bad acts. Jacobs asserts that the trial court should have excluded evidence regarding the Morgan incident. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003) provides in pertinent part as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Our courts have interpreted Rule 404(b) as stating a general rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, with its lone exception being where the “*only* probative value [of the evidence] is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990) (emphasis in original). “Where, however, the evidence tends to prove any other relevant fact, such as an intent or motive to commit a crime charged, the evidence will not be excluded simply because it shows that the defendant is guilty of an independent crime.” *State v. White*, 331 N.C. 604, 611, 419 S.E.2d 557, 561 (1992). In addition, “[t]he admissibility of evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity [of the acts].” *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (citations omitted).

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In the instant case, Jacobs was charged with first-degree burglary, armed robbery, second-degree kidnapping, and impersonating a law enforcement officer. These charges arose from Jacobs' alleged involvement in a scheme whereby individuals would dress and act like law enforcement officials in an effort to obtain property from others. At trial, the State offered evidence tending to show that two days after the incident involving the Chavises, Jacobs and Brayboy went to Morgan's residence dressed as law enforcement officers, presented Morgan with a pink slip of paper, and informed Morgan that they had "a search warrant to search the house." Morgan testified that Jacobs and Brayboy "had on black fatigues[.]" that "[o]ne of them had on a sheriff's T-shirt[.]" and that "[t]he other one had just regular police right across the front of [his shirt] and had on boots." Morgan further testified that "[o]ne of them had a 12-gauge," and that "[t]he other had a .45." Morgan recalled being bound by plastic handcuffs and placed on the floor of the kitchen while Jacobs and Brayboy took property from his residence, and he remembered Jacobs and Brayboy stating that they were "carrying [the property] outside to run it in, the numbers, [to] check and see if [it was] stolen or anything." Morgan stated that after they took property from his residence, Jacobs and Brayboy placed him in the back seat of an "old brown police car[]" and transported him to "the woods" in Maxton. Morgan recalled Jacobs and Brayboy thereafter removing his handcuffs, searching him again, and rebinding his hands together with duct tape. Morgan testified that Jacobs then ordered him to walk in front of the car, where Jacobs shot him in the feet with the shotgun. On appeal, Jacobs contends that "[b]eyond the relevant evidence that they dressed as law enforcement officers and robbed [Morgan] at his home," the remaining evidence of the Morgan incident was prejudicial and thus should have been excluded. We cannot agree.

"Where evidence of prior conduct is relevant to an issue other than the defendant's propensity to commit the charged offense, 'the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403.'" *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)). Thus, "once a trial court has determined the evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence." *Stevenson*,

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169 N.C. App. at 800-01, 611 S.E.2d at 209; N.C. Gen. Stat. § 8C-1, Rule 403 (2003). “That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision.” *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001).

In the instant case, we are not persuaded that the trial court abused its discretion by ruling that the evidence regarding the Morgan incident was admissible. The Morgan incident occurred two days after the incident involving the Chavises, and, as detailed above, it also involved the assailants’ entry into the victim’s residence under the auspices of legitimate law enforcement activity. The assailants in both the Morgan and Chavis incidents were dressed as law enforcement officers and displayed a “search warrant” as well as firearms in an effort to gain entry into the respective residences. Once inside, the assailants in both incidents bound their victims by using plastic handcuffs and searched the residences for “illegal” items. At the conclusion of both incidents, the assailants left in what was consistently described as an older model law enforcement vehicle. The record reflects that the trial court was aware of the possible prejudice stemming from the dissimilarities of the incidents (including the fact that Morgan was shot), and it repeatedly instructed the jury regarding the limited purposes for which the evidence of the Morgan incident could be used. In light of the foregoing, we conclude that the trial court did not err by admitting evidence of the Morgan incident. Accordingly, Jacobs’ second argument is overruled.

[4] Jacobs next argues that the trial court erred by allowing the State to question Parker and Brayboy regarding their prior inconsistent statements. Jacobs asserts that because Parker and Brayboy’s trial testimony “minimized, if not exempted, [Jacobs] from participation in the crime[,]” the State should not have been allowed to refer to their custodial statements to law enforcement officers. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 607 (2003) provides that “[t]he credibility of a witness may be attacked by any party, including the party calling him.” Thus, “where the party calling a witness is genuinely surprised by the witness’ change of his or her version of facts, impeachment by prior inconsistent statements is proper.” *State v. Miller*, 330 N.C. 56, 62-63, 408 S.E.2d 846, 850 (1991) (citing *State v. Hunt*, 324 N.C. 343, 350, 378 S.E.2d 754, 758 (1989)). “Likewise, where there is testimony that a witness fails to remember having made cer-

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tain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, . . . the witness [may] be impeached with the prior inconsistent statement.” *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323, *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001). “However, it is well settled that in such situations the prior inconsistent statements may only be used to impeach the witness’ credibility; they may not be admitted as substantive evidence.” *Miller*, 330 N.C. at 63, 408 S.E.2d at 850 (citing *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758; *State v. Grady*, 73 N.C. App. 452, 456, 326 S.E.2d 126, 129 (1985); 1 Brandis on North Carolina Evidence § 46 (1988)).

In the instant case, both Parker and Brayboy testified on behalf of the State, and both initially testified in a manner inconsistent with their custodial statements to law enforcement officers. Although Parker and Brayboy both agreed to having made their custodial statements, neither could remember all parts of their custodial statement or whether it was completely accurate. Over Jacobs’ objection, the trial court allowed Parker and Brayboy to review their statements and the State to impeach both witnesses by use of the statements. Jacobs contends that this was error, in that the trial court (i) failed to find that the State was surprised by the testimony and (ii) erred by admitting the evidence for substantive purposes. We cannot agree.

Our Supreme Court has previously held that

before granting the prosecutor’s motion to treat his witness as hostile or unwilling and to cross-examine him, “the court must be satisfied that the State’s attorney has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect. . . . If the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered.”

State v. Lovette, 299 N.C. 642, 648, 263 S.E.2d 751, 755-56 (1980) (citations omitted) (emphasis and alteration in original). However, these “technical requirements” were abolished by the adoption of N.C. Gen. Stat. § 8C-1, Rule 607. *See State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987) (citing *State v. Holsey*, 318 N.C. 330, 340, 348 S.E.2d 805, 811 (1986) (concluding that where the record on appeal “manifestly shows that the witness was only ostensibly the witness of the party calling her and was entirely friendly to the party cross-examining her, the trial court does not commit reversible error by

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failing to make such a formal declaration. A trial court may properly limit leading questions of a witness in such situations without conducting a *voir dire* hearing or making any formal declaration.”)).

In the instant case, the record clearly demonstrates that Parker and Brayboy were testifying contrary to the expectations of the State, and there is no indication that the State called the witnesses or used their impeachment “as a mere subterfuge to get evidence before the jury which was otherwise inadmissible.” *Riccard*, 142 N.C. App. at 304, 542 S.E.2d at 324. Furthermore, we note that the trial court instructed the jury that “[w]hen evidence has been received tending to show that, at an earlier time, a witness made a statement which . . . may be consistent or may conflict with his testimony at this trial you must not consider such earlier statement as evidence of the truth of what was said at the earlier time” In light of the foregoing, we conclude that the trial court did not err either by allowing Parker and Brayboy to refresh their memory through their prior custodial statements or by allowing the State to impeach them through use of the statements. Accordingly, we overrule Jacobs’ third argument.

[5] Jacobs next argues that the trial court erred by sustaining the State’s objections to various questions asked of Morgan on cross-examination. Jacobs first asserts that the trial court erred by limiting his questions regarding Morgan’s prior convictions for simple assault and probationary status. Jacobs also asserts that the trial court erred by limiting his questions regarding a transcript of plea Morgan signed prior to Jacobs’ trial. While we note that the trial court has discretionary power regarding the limits of cross-examination aimed at impeaching a witness, we also note that “[t]he discretionary power of the trial judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness’ testimony.” *State v. Roberson*, 215 N.C. 784, 787, 3 S.E.2d 277, 279-80 (1939). Nevertheless, assuming *arguendo* that the trial court erred by limiting Jacobs’ cross-examination, we are not persuaded that Jacobs is entitled to a new trial. Morgan’s testimony focused on his own kidnapping and robbery rather than those charges Jacobs faced at trial. Brayboy provided a similar account of the incident and detailed Jacobs’ involvement in it during his testimony. Morgan’s statement to Detective Carter was admitted into evidence along with his photographic identification of Brayboy and Jacobs. Defense counsel was

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allowed to question Morgan regarding his current incarceration, his conviction for possession of a firearm on educational property, his conviction for possession of a firearm by a felon, his conviction for driving after consuming an alcoholic beverage, his conviction for resisting a public officer, and his conviction for violating a domestic violence order. With respect to the plea transcript, although after examining the document the trial court concluded and instructed the jury that “[t]here is nothing in those papers, in writing . . . requiring James Morgan to testify in this case[.]” the trial court instructed defense counsel that he was allowed to “ask [Morgan] if he got some consideration for his testimony here today[.]” In light of the foregoing, we conclude that Jacobs has failed to demonstrate that he was prejudiced by any error of the trial court. Accordingly, we overrule Jacobs’ fourth argument.

[6] Jacobs next argues that the trial court erred by allowing Detective Strickland to read McMillian’s custodial statement to the jury. Jacobs asserts that the statement was not properly redacted prior to its introduction. We disagree.

N.C. Gen. Stat. § 15A-927(c)(1) (2003) provides as follows:

When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

- a. A joint trial at which the statement is not admitted into evidence; or
- b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
- c. A separate trial of the objecting defendant.

In the instant case, the State sought to introduce McMillian’s statement at trial in an effort to demonstrate McMillian’s role in the Chavis incident. Prior to the statement being read by Detective Strickland, the parties and the trial court had extensive discussions regarding what portions of McMillian’s statements should be redacted. The State initially sought to replace the references to Jacobs with the word “someone.” However, after discussing the issue with defense counsel and the trial court, the State agreed to take out

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all references to Jacobs by name. Detective Strickland thereafter read McMillian's statement in pertinent part as follows:

I, Bruce Lee McMillian, want to make the following statement. On July the 29th, 2002, I got to the barn about 11:00 or 11:30 p.m. George Allen [Locklear] and myself rode to Jonesville and back around by Modes' old store. We followed Sharrone [Brayboy] and [William] Robert [Parker] because he did not have any turn signals on the old brown Caprice. I asked George where we were going, and he said, "Just follow them. We're fixing to get one." . . . I said, "What, you are not going to rob nobody, are you?" George said, "No, they are." We followed them what seemed like through half of Robeson County to get there. We turned around at a stop sign, and I knew where we were at. Then, I knew who they were going to rob. Sharrone and Robert pulled up in a man's yard. We went right past the house and parked on the dirt road where we could see the house. We probably sit on the dirt road about 5 minutes. We rode back to the stop sign and turned around. I stopped where they pulled out from. I got out of the car, walked to the house and told Sharrone, "Let's go." I did not have no police shirt on. I did not have a gun or nothing. I walked back out of the house and got into the car and was still waiting on Sharrone. Sharrone finally came out of the house and got in the car, and we left. When we were going down the road, Sharrone pulled out a lot of money and some dope in a clear, plastic bag. I think it was crystal meth. We went back to the barn. . . . I left and went to the other house in Laur[i]nburg and got everybody some food. We all ate and went to bed. That was it on that one.

On appeal, Jacobs contends that because "the redacted statement used the pronoun 'we' as a place holder for the defendant, the admission of the Statement violated [Jacobs'] Constitutional right to confront witnesses." We recognize that our courts have previously held that "the introduction of a nontestifying defendant's confession that does not mention a codefendant could implicate the codefendant and violate [his rights] if it is clear that the confession is referring to the codefendant." *State v. Littlejohn*, 340 N.C. 750, 755, 459 S.E.2d 629, 632 (1995) (citing *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985) and *State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984)); see *Bruton v. United States*, 391 U.S. 123, 126, 20 L. Ed. 2d 476, 479 (1968) (holding that the defendant's confrontation rights were violated by the admission into evidence of a nontestifying co-defendant's confession which was "powerfully incriminating" in that it implicated the defend-

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ant in the crime and thus created a “substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [the defendant’s] guilt[.]”). However, in the instant case, we are not persuaded that the use of the word “we” in McMillian’s redacted statement clearly implicated Jacobs. As detailed above, the word followed and was included in sentences which discussed the location and activity of several individuals, most often McMillian, Brayboy, and Locklear. The statement was read after careful redaction by the State and contains no obvious deletions or breaks. In light of the foregoing, we conclude that McMillian’s statement does not clearly identify Jacobs or otherwise contain those “powerfully incriminating” characteristics requiring reversal under the Confrontation Clause. Accordingly, we overrule Jacobs’ fifth argument.

III. Sentencing and Attorney’s Fees

[7] Jacobs’ sixth argument is that the trial court erred by sentencing him in the aggravated range. Jacobs asserts that the trial court was prohibited from sentencing him in the aggravated range without first submitting the aggravating factors to the jury for proof beyond a reasonable doubt. We agree.

In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), our Supreme Court recently reviewed North Carolina’s structured sentencing scheme in light of the United States Supreme Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). After reviewing the pertinent case law, the Court determined that, when “[a]ppplied to North Carolina’s structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt.” *Allen*, 359 N.C. at 437, 615 S.E.2d at 265 (citing *Blakely*, 542 U.S. at —, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17). The Court noted that its holding “appl[ie]d] to cases ‘in which the defendants have not yet been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final[.]’ thereby making it applicable to the instant case. 359 N.C. at 427, 615 S.E.2d at 258 (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001)); see also N.C. Gen. Stat. § 15A-1446(d)(19).

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Here, as aggravating factors to Jacobs' convictions, the trial court found that Jacobs (i) induced others to participate in the commission of the offenses, (ii) joined with more than one other person in committing the offenses and was not charged with conspiracy, (iii) took advantage of a position of trust or confidence to commit the offenses, and (iv) committed the offenses against physically infirm victims. The trial court found these factors unilaterally, thereby violating the Court's decision in *Allen* and the cases cited therein. The State contends that this error was nevertheless harmless, in that it introduced uncontroverted and overwhelming evidence to establish the existence of the aggravating factors. However, "[b]ecause 'speculat[ion] on what juries would have done if they had been asked to find different facts' is impermissible," the Court concluded in *Allen* that "[h]armless error analysis cannot be conducted on *Blakely* Sixth Amendment violations." 359 N.C. at 448, 615 S.E.2d at 271-72 (quoting *State v. Hughes*, 154 Wash. 2d 118, 148, 110 P.3d 192, 208 (2005)). Therefore, in light of the Court's decision in *Allen*, we conclude that the trial court committed reversible error by aggravating Jacobs' sentences in the instant case. Accordingly, we remand the case to the trial court for resentencing.

[8] Jacobs' final argument is that the trial court erred by imposing attorney's fees upon him. Jacobs asserts that he was not provided with sufficient notice of or an opportunity to be heard concerning the fees of his court-appointed attorney. We agree.

N.C. Gen. Stat. § 7A-455 (2003) provides that the trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney. In *State v. Crews*, 284 N.C. 427, 201 S.E.2d 840 (1974), the trial court entered a judgment imposing fees upon the defendant for his attorney's services. On appeal, our Supreme Court noted that the record was unclear regarding whether the judgment was entered against the defendant without notice or opportunity for him to be heard. Accordingly, the Court vacated the judgment "without prejudice to the State's right to apply for a judgment in accordance with G.S. 7A-455 after due notice to [the] defendant and a hearing[.]" *Id.* at 442, 201 S.E.2d at 849-50. Similarly, in *State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980), this Court vacated a civil judgment imposing attorney's fees on an indigent defendant where there was "no indication [in the record] that [the] defendant received any opportunity to be heard on the matter" of attorney's fees. In *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005), this Court

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vacated the trial court's award of attorney's fees where, although the issue was discussed following the defendant's conviction, "there [wa]s no indication in the record that [the] defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed."

In the instant case, following the imposition of Jacobs' sentence, the trial court stated in pertinent part as follows:

As to both defendants, they shall be ordered to pay cost[s], and judgments will be placed against them for both the cost[s] and attorneys' fees. . . . Gentlemen, you calculate your hours and submit that to me. A judgment will be placed against your individual clients for those amounts.

The trial court's statement demonstrates that Jacobs was given notice of the trial court's intention to impose attorney's fees upon him. However, while the transcript reveals that attorney's fees were discussed following his conviction, there is no indication that Jacobs was notified of and given an opportunity to be heard regarding his appointed attorney's total hours or the total amount of fees imposed. Therefore, in light of the foregoing, we vacate the trial court's imposition of attorney's fees in this matter. On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that Jacobs is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by his attorney.

McMillian's Appeal

The issues in McMillian's appeal are whether the trial court erred by: (I) failing to cure an alleged improper remark made during the State's closing argument; (II) allowing the State to introduce a redacted version of Jacobs' custodial statement; (III) failing to grant McMillian's motion to sever the trial; and (IV) instructing the jury regarding second-degree kidnapping.

I. State's Closing Argument

[9] McMillian first argues that the trial court erred by failing to properly cure a remark made by the Assistant District Attorney during the State's closing argument. The trial transcript contains the following pertinent exchange:

THE STATE: In Bruce's case, Bruce actually went inside the Chavises' house, when they were—if you recall, this is from him-

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self—now, remember, the State must prove all the evidence. The State must provide it all. The State presents it all. In this case, the State didn't present it all. However, we did hear from the defendants. They made statements.

JACOBS' COUNSEL: Objection, Your Honor—

THE COURT: Overruled.

THE STATE: Their statements—

JACOBS' COUNSEL: Your Honor, may I be heard?

THE COURT: Approach the bench please.

....

[The sidebar conference was conducted as follows out of the hearing of the jurors.]

JACOBS' COUNSEL: Your Honor, [the Assistant District Attorney] said that the jury had not heard from the defendants. By saying that, he commented—and has commented on the defendants not testifying. I think that's reversible error, calls for a mistrial.

THE STATE: If you'll let me finish what I was saying, I'm very clear on what I'm saying.

THE COURT: I think I probably need to instruct them. Let me instruct them. Your motion for a mistrial is denied, however.

....

THE STATE: May I note, if I could at least finish the sentence I'm saying—and I started saying it—that they made statements, recorded, put in writing and signed by them, which were presented into evidence. That's all true.

....

[The parties to the sidebar conference resumed their respective places in the courtroom.]

THE COURT: Members of the jury, let me instruct you as follows regarding [the Assistant District Attorney's] argument. There's some suggestion that you had not heard from the defendants. Let me again remind you the defendants are under no obligation, absolutely no obligation to offer testimony or to testify them-

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selves in this case. That is true in this case as well as any case, any criminal case. The defendant cannot be compelled to testify. He has an absolute right to testify, and no mention should be made of his failure to testify. You may continue.

THE STATE: In Exhibits 35 and 36, we have the statements made, respectively, by Curl[e]y Jacobs and Bruce Lee McMillian. . . .

While he concedes that he did not object during the State's closing argument or following the trial court's instruction, McMillian asserts that the trial court committed plain error by failing to grant a mistrial following the statement and by improperly instructing the jury. Although we note that our courts have limited plain error review only to those errors in a trial court's jury instructions or rulings on admissibility of evidence, *see, e.g., State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000), to the extent McMillian has failed to preserve this argument, we have chosen to review it pursuant to the discretion granted us by N.C.R. App. P. 2.

Both the federal Constitution and our state's statutes prohibit the prosecution from commenting on a defendant's failure to testify at trial. *See Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 110 (1965) ("We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.") (citations omitted) and N.C. Gen. Stat. § 8-54 (2003) ("In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him."). However, these rules are not meant "to restrict the prosecutor from making . . . comments upon the evidence and drawing . . . deductions therefrom . . ." *State v. Richardson*, 342 N.C. 772, 786-87, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996).

In the instant case, we are not persuaded that the Assistant District Attorney's closing argument commented on McMillian's failure to testify. As he noted at trial, in submitting that the jury "did hear from the defendants" and that "[t]hey made statements[,]," the Assistant District Attorney was referring to the statements made by defendants following their arrest, not their failure to testify at trial. In

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State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907), the defendant objected to the prosecution's closing argument statement that "none of the evidence as testified to by the State's witnesses had been contradicted, and no one had said that it was not true." On appeal, our Supreme Court concluded that "[t]his could not be taken as a criticism upon the failure of the defendant to put himself upon the stand[.]" and it noted that the trial court, "out of abundant caution," thereafter informed the jury that "the fact that the defendant did not go upon the stand could not be considered by the jury to his prejudice, and that, if they had understood the Solicitor as meaning to comment on that fact, they should disregard it[.]" *Id.* at 584-85, 59 S.E. at 867. In the instant case, we are similarly unconvinced that the Assistant District Attorney's comments could be taken as a criticism of McMillian's decision not to testify. Furthermore, we note that after overruling Jacobs' objection, the trial court explained to the jury that both defendants were under no obligation to testify during their trial. In light of the foregoing, we conclude that the trial court did not err either by refusing to grant a mistrial or by instructing the jury regarding the Assistant District Attorney's comments. Accordingly, we overrule McMillian's first argument.

II. Evidentiary Issues

[10] McMillian next argues that the trial court erred by admitting Jacobs' custodial statement into evidence. McMillian asserts that the statement was inadmissible because it was improperly redacted and implicated him in the incident. We note initially that, despite his failure to provide any argument supporting the contention that the trial court committed plain error, McMillian requests that this Court examine his argument under plain error analysis. "The right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention" that the trial court's actions amounted to plain error. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). "By simply relying on the use of the words 'plain error' as the extent of his argument in support of plain error, [Jacobs] has effectively failed to argue plain error and has thereby waived appellate review." *Id.* at 637, 536 S.E.2d at 61. Nevertheless, in our discretion pursuant to N.C.R. App. P. 2, we have chosen to review McMillian's argument and, as detailed below, we conclude that he has failed to show prejudice resulting from the introduction of the statement.

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The record reflects that following a conference between the State, defense counsel, and the trial court, Detective Strickland read to the jury the following redacted version of Jacobs' custodial statement:

On Saturday and Sunday, July 27th and 28th, 2002, I had been talking to Cricket, who is William Parker, and Sharrone Brayboy. Cricket had been wanting to make a lick. The white boy, William Parker, said "What about Lee Otis [Chavis], the man you know?" I said, "Who, Lee Otis?" He said, "Yes, the crank man." I told him them was old people; if anything went down, to be real gentle with him because he had by-pass surgery. The white boy said, "Don't you know where everything is? Just tell me where it's at, and I will get it." He was talking about the money and the dope and scales. Monday night, George Allen [Locklear] came to the house and picked me up in a green Cavalier. When I got to the barn, the white boy and Sharrone were already dressed with police shirts. The white boy, William Parker, said, "We are ready, but we don't know how to get there." I drove the brown Caprice . . . by the house and pointed it out to the white boy and Sharrone. George Allen were following us in a green Cavalier. The green one was sitting at the barn when they come and picked us up. We went on past the house to the stop sign. We went straight across for about 2 miles and pulled off the shoulder of the road. I got in the car with George Allen, and we rode back by the house and parked on the dirt road so we could watch Lee Otis' house. We had told them to turn the porch light off when everything was all right. We kept sitting and waiting and waiting, and they never came out. We pulled in front of the house and the white boy came out. I could hear Cricket telling someone that, "Sharrone won't come out of the house." Someone went in the house and told Sharrone to, "Let's go." We left the house and stopped about 4 or 5 miles down the road and put licensed drivers under the steering wheel. I got in the Caprice and started driving it. We went back to the barn. I don't want to go any further at this point due to the fact of being charged with conspiracy for being tied into this case. There was two or three of us that got licked because Sharrone . . . held out with the money or it was him or the white boy. Their figures did not add up.

On appeal, McMillian contends that the replacement of his name with the word "someone" implicated him in the incident and thus violated his Confrontation Clause rights. However, we note that

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The mere finding of a violation of the *Bruton* rule in the course of the trial . . . does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Schneble v. Florida, 405 U.S. 427, 430, 31 L. Ed. 2d 340, 344 (1972); *Hayes*, 314 N.C. at 470, 334 S.E.2d at 747. In the instant case, assuming *arguendo* that it was improper for the trial court to allow Detective Strickland to read the redacted version of Jacobs' statement, we are not convinced McMillian is entitled to a new trial. The State presented overwhelming evidence to establish McMillian's guilt notwithstanding Jacobs' statement, including testimony from Mrs. Chavis and Brayboy which tended to show that McMillian entered the Chavis residence during the incident and was referred to by the name "Sarge." As detailed above, McMillian's own statement to law enforcement officers describes his involvement in the incident, including his "g[etting] out of the car, walk[ing] to the house and t[elling] Sharrone, 'Let's go.'" In light of the foregoing, we conclude that any error related to the introduction of Jacobs' statement was harmless. Accordingly, we overrule McMillian's second argument.

III. Motion to Sever

[11] McMillian next argues that the trial court erred by failing to grant his motion to sever the trial. McMillian asserts that the trial court should have severed the trial because it was "but a simple leap" for the jury to believe that he was involved in the Morgan incident. We disagree.

Where the State charges two defendants for the same crime or crimes, "public policy strongly compels consolidation as the rule rather than the exception." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 639 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). "The question of whether defendants should be tried jointly or separately is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed on appeal absent a showing that joinder has deprived a defendant of a fair trial." *State v. Evans*, 346 N.C. 221, 232, 485 S.E.2d 271, 277 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998).

In the instant case, despite his express acknowledgment in his brief that "[a]ccording to the evidence, [he] did not have anything to

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do with the incident involving the shooting” of Morgan, McMillian contends that the introduction of evidence concerning the Morgan incident deprived him of a fair trial. However, after reviewing the record in its entirety, we are not convinced that the trial court abused its discretion by denying McMillian’s motion to sever the trial. McMillian was not identified as a participant in any stage of the Morgan incident, and the trial court twice instructed the jury regarding the limited use of the evidence, including that it was limited to “the defendant Curl[e]y Jacobs” and “received solely for the purpose of showing that he was aware—that is, he, Curl[e]y Jacobs—was aware of a common plan, scheme, or design involved in the charge or the crime in the present case” “If we were convinced that juries were unable to separately evaluate the guilt or innocence of defendants tried jointly because of a tendency to determine guilt by association at trial, we would never uphold joint trials of criminal defendants.” *State v. Lowery*, 318 N.C. 54, 61, 347 S.E.2d 729, 735 (1986). In the instant case, because evidence of the Morgan incident in no way implicated McMillian and was clearly admitted for limited purposes, we conclude that the trial court did not err by denying McMillian’s motion to sever the trial. Accordingly, McMillian’s third argument is overruled.

IV. Jury Instructions

[12] McMillian’s final argument is that the trial court erred by instructing the jury regarding the second-degree kidnapping charges. McMillian asserts that it was plain error for the trial court to instruct the jury that it may convict McMillian for second-degree kidnapping if it found that the victims were restrained “for the purpose of commission of burglary and armed robbery[,]” in that the indictments of the kidnapping offenses alleged that the victims were restrained “for the purpose of facilitating the commission of a felony, robbery[.]” We disagree.

“It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977) (citations omitted); *State v. Tirado*, 358 N.C. 551, 574, 599 S.E.2d 515, 532 (2004), *cert. denied*, — U.S. —, 161 L. Ed. 2d 285 (2005). “Under [plain error] analysis, defendants must show that [jury] instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.” *Tirado*, 358 N.C. at 574, 599 S.E.2d at 531 (citing N.C. Gen. Stat. § 15A-1443(a) (2003)). Thus, to prevail under plain error in the

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instant case, McMillian must demonstrate that the trial court's alleged error was "so fundamental that it denied [him] a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

In *Tirado*, our Supreme Court noted that

Error arises when a trial judge permits a jury to convict upon an abstract theory not supported by the bill of indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). This Court has held such error to be prejudicial when the trial court's instruction as to the defendant's underlying intent or purpose in committing a kidnapping differs from that alleged in the indictment. *See State v. Brown*, 312 N.C. 237, 249, 321 S.E.2d 856, 863 (1984) (holding that when the trial court charged the jury on an additional purpose for kidnapping not listed in the indictment and the State presented no evidence on such theory, the jury instructions constituted plain error); *see also State v. Taylor*, 301 N.C. at 171, 270 S.E.2d at 413-14 (holding that complete failure to instruct the jury on the theory charged in the bill of indictment together with instructions based on theories not charged in the indictment constituted prejudicial error); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 841 (1977) (holding that where theories of the crime were "neither supported by the evidence nor charged in the bill of indictment," the instructions constituted prejudicial error). However, we have also found no plain error where the trial court's instruction included the purpose that was listed in the indictment and where compelling evidence had been presented to support an additional element or elements not included in the indictment as to which the court had nevertheless instructed. *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001).

358 N.C. at 574-75, 599 S.E.2d at 532.

In the instant case, the indictments for second-degree kidnapping asserted that the Chavises were restrained "for the purpose of facilitating the commission of a felony, robbery[.]" However, at trial, the trial court instructed the jury that it may convict McMillian if it found that the restraint was "for the purpose of commission of burglary and armed robbery." Following this instruction, the trial court informed the jury of the elements of first-degree burglary and armed robbery, crimes for which McMillian was also indicted and convicted. Assuming *arguendo* that the trial court erred by instructing the jury

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regarding the additional felony, after examining the record and the instructions in their entirety, we are not persuaded that the alleged error was “a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *Id.* at 576, 599 S.E.2d at 532 (quotations and citations omitted). Instead, we note that the trial court’s instruction actually *added* a second crime to the purpose of the restraint, thereby placing a *higher* burden of proof on the State. Furthermore, compelling evidence supported the additional theory submitted by the trial court, and the jury found McMillian guilty of the crime giving rise to it. In light of the foregoing, we are unable to conclude that a different result would have been reached had the trial court instructed the jury only on the theory alleged in the State’s indictment. Accordingly, we overrule McMillian’s final argument.

Conclusion

In light of the foregoing, we hold that both defendants received a trial free of prejudicial error. However, because the trial court failed to submit aggravating factors to the jury and failed to provide Jacobs with proper notice regarding the imposition of attorney’s fees, we vacate and remand Jacobs’ case in part. On remand, the trial court may engage in any proceedings necessary to comply with the instructions detailed above.

As to Jacob’s Appeal: No error in part; vacated and remanded in part.

As to McMillian’s Appeal: No error.

Judge BRYANT concurs.

Judge LEVINSON concurs in part and dissents in part in a separate opinion.

LEVINSON, Judge concurring in part and dissenting in part.

I concur in the majority opinion except to the extent it vacates those portions of the judgments which purportedly impose attorney fees against Jacobs. The majority reasons that, because Jacobs did not have an opportunity to be heard concerning the number of attorney hours or the total fee, he is entitled to another hearing. This is, in my view, erroneous for two reasons.

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First, there has been no appeal from, and the record is completely devoid of, any judgments or orders which require Jacobs to pay attorney fees. The criminal judgments on appeal only provide, “[a] civil judgment is to be placed against defendant for attorney fees.” As there is *nothing* in the record on appeal to suggest what, if anything, the court ever entered on attorney fees, there is likewise *nothing* for this Court to address. The majority opinion attempts to vacate, in part, an order that may never have been entered; may have actually been entered only after some subsequent notice and hearing; and may require defendant to pay \$0. We cannot know because such an order is not before this Court.

Secondly, the trial court has only indicated its intention to enter a subsequent order. In this regard, the trial court did exactly that which our appellate precedent requires: it declined to enter a civil judgment against defendant for an amount certain *until some later time* when he would have an opportunity to be heard.

MARVIN FABRIKANT AND WIFE, PATRICIA A. FABRIKANT, ARTHUR C. SMITH, III, AND MPF INVESTMENT CO., L.P., AND ARTHUR C. SMITH, III, TRUSTEE, ARTHUR C. SMITH III REVOCABLE TRUST, PLAINTIFFS v. CURRITUCK COUNTY, A NORTH CAROLINA BODY POLITIC AND CORPORATE, COROLLA ASSOCIATES, A VIRGINIA LIMITED PARTNERSHIP, WHALEHEAD ASSOCIATES, A VIRGINIA LIMITED PARTNERSHIP, H I S WHALEHEAD, A VIRGINIA LIMITED PARTNERSHIP, GERALD J. FRIEDMAN, WHALEHEAD PROPERTIES, A VIRGINIA JOINT VENTURE, NANCY FRIEDMAN, ESTATE OF SAMUEL SANDLER, DECEASED, HARRY SANDLER, STATE OF NORTH CAROLINA, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, COASTAL RESOURCES COMMISSION, DIVISION OF COASTAL MANAGEMENT, AND DONNA D. MOFFITT, AS DIRECTOR OF THE DIVISION OF COASTAL MANAGEMENT, DEFENDANTS

No. COA04-250

(Filed 18 October 2005)

1. Appeal and Error— appealability—dismissal of claims— certification—final judgments on some claims

The trial court’s dismissal of five of twenty-three claims was interlocutory but properly before the Court of Appeals because the trial court included a Rule 54(b) certification and the dismissals were final judgments.

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2. Immunity— governmental—waiver—pleadings

Waiver of governmental immunity must be specifically alleged, but precise language is not necessary as long as sufficient allegations are present to provide a reasonable forecast of waiver. The determination is limited to the complaint and its attachments.

3. Immunity— governmental—action for injunction—trespass on beachfront land

Shingleton v. State, 260 N.C. 451, precluded plaintiffs' argument that sovereign immunity was waived by N.C.G.S. § 41-10.1 for a claim for an injunction restraining interference by the State with plaintiffs' exclusive use of beachfront property. Property owners cannot maintain an action against the State to restrain the commission of a tort where they cannot maintain the action in tort. Plaintiffs could have brought individual capacity claims against State officers, but did not.

4. Immunity— governmental—beachfront land—quiet title action—no claim of title

Plaintiffs failed to allege facts sufficient to constitute a waiver of the State's sovereign immunity under N.C.G.S. § 41-10.1 and their claim to quiet title to the dry sand area in front of beachfront property was properly dismissed.

5. Declaratory Judgments— pleadings—actual controversy required—only complaint considered

Jurisdiction to render a declaratory judgment exists only when the complaint demonstrates an actual controversy. The answer and the course of multi-claim litigation are not considered.

6. Declaratory Judgments— allegations—justiciable controversy

A declaratory judgment seeking an interpretation of the public trust doctrine as applied to dry sand beach areas was properly dismissed because plaintiffs did not allege a justiciable controversy. Plaintiffs alleged at most a statement by a single State official asserting a standard that he applied generally, but which has not been applied to plaintiffs' property.

7. Constitutional Law— taking of dry sand beach—underlying claims dismissed

Claims for an unconstitutional taking regarding the "dry sand area" of a beach were not addressed where the under-

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lying claims to quiet title and declaratory relief were properly dismissed.

8. Appeal and Error— invited error—no supporting authority

Plaintiffs were not entitled to the “stipulated dismissal” of an amended takings claim rather than a dismissal on the merits where they gave the court the option of outright dismissal. Further, they cited no authority in support of their argument.

Appeal by plaintiffs from orders entered 22 July 2003 by Judge J. Richard Parker in Currituck County Superior Court. Heard in the Court of Appeals 20 October 2004.

Huff, Poole & Mahoney, PC, by J. Bryan Plumlee; Carter, Archie & Hassell LLP, by Sid Hassell; and David J. Bederman, pro hac vice, for plaintiffs-appellants.

Attorney General Roy C. Cooper, by Special Deputy Attorney General Ronald M. Marquette, Special Deputy Attorney General J. Allen Jernigan, Assistant Attorney General Marc D. Bernstein, and Assistant Attorney General Meredith Jo Alcoke, for the State.

GEER, Judge.

Plaintiffs, who own oceanfront property in Currituck County, brought suit against various defendants, including the State of North Carolina, the North Carolina Department of Environment and Natural Resources (“DENR”), the Coastal Resources Commission, the Division of Coastal Management, and the Director of the Division of Coastal Management (collectively “the State defendants”). With respect to the State defendants, plaintiffs have sought (1) a declaratory judgment that they have exclusive ownership of the portion of the beach between the high tide mark and the vegetation line, identified as “the dry sand beach,” (2) to quiet title in that portion of the beach, and (3) injunctive relief. Because we hold that the quiet title and injunctive relief claims are barred by sovereign immunity and that there is no justiciable controversy with respect to the declaratory judgment claim, we affirm the trial court’s orders dismissing plaintiffs’ claims against the State defendants.

Facts

The beach community known as Whalehead Club is located in Currituck County near Corolla, North Carolina. Plaintiffs each own

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property at Whalehead. At the heart of plaintiffs' claims are their contentions regarding ownership of various parts of the beach that Whalehead borders. The beach adjacent to the Atlantic Ocean along North Carolina's Outer Banks is generally identified as having three "zones." These zones are (1) the "wet sand beach," which is the area "subject to regular flooding by tides," N.C. Gen. Stat. § 77-20(e) (2003); (2) the "dry sand beach," which is the area "subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm," *id.*; and (3) the area landward of the dry sand beach. The debate in this case concerns the dry sand beach.¹

On 19 September 1997, several property owners in Whalehead filed a lawsuit in the United States District Court for the Eastern District of North Carolina against various defendants, among them Currituck County, the North Carolina Department of Transportation ("DOT"), and the North Carolina Board of Transportation ("BOT"). Although the record before this Court does not contain the federal court complaint, the record indicates the complaint alleged that the Whalehead beach was private property and that the County and DOT injured plaintiffs by encouraging public access to the ocean and beach areas.

DOT and BOT filed a motion to dismiss, based on (1) lack of diversity of citizenship, (2) failure to join the State of North Carolina and DENR as necessary parties, and (3) immunity under the Eleventh Amendment to the United States Constitution. In support of the motion, DOT and BOT filed the affidavit of Roger N. Schecter, then Director of the Division of Coastal Management, a division within DENR.

Following the filing of defendants' motion to dismiss, plaintiffs voluntarily dismissed the federal lawsuit and filed this action in Currituck County Superior Court on 19 June 1998. Plaintiffs included as defendants the developer of Whalehead, general partners of the developer, the original owners of the undeveloped Outer Banks property that became Whalehead, and Currituck County. Plaintiffs also

1. For a description of many of the underlying substantive issues in this lawsuit, see generally Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869 (2000). The precise boundaries, and, indeed existence, of the beach "zones" are in contention, and many issues relating to the ownership of North Carolina's beaches have not yet been fully litigated below and are not properly before us at this time. Therefore, we explicitly refrain from expressing any opinion as to such issues.

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sued the State of North Carolina, DOT, BOT, DENR, the Coastal Resources Commission, the Division of Coastal Management, and Roger N. Schecter “as Director of the Division of Coastal Management.” The complaint identifies the latter defendants collectively as the “State Defendants.”

Plaintiffs’ complaint alleges that plaintiffs purchased their property based on representations indicating that the Whalehead beach would be private, secluded, and remote. Plaintiffs also allege that they were told that the property lines for the oceanfront lots stretched to the mean high tide line. Restrictive covenants provided that the lots in the section where plaintiffs purchased their property could only be used for residential purposes.

According to the complaint, the original developers conveyed to Currituck County several oceanfront lots in the “residential purposes only” section. After the County paved those lots, the developer assured Whalehead residents that the paved lots were for the exclusive use of Whalehead residents and their guests. In 1995, however, Currituck County erected signs that indicated the paved lots were for public parking.

In addition, the complaint alleges that access ramps or walkways stretching from a Whalehead road to the vegetation line on the beach were constructed on 10-foot-wide strips of land that were owned by the developer. Signs also appeared at intervals along the easternmost north-south road in Whalehead identifying these ramps and walkways as providing “Public Beach Access.” Plaintiffs allege “upon information and belief” that the ramps or walkways and the signs were constructed by the State defendants, the developer, or the County and that they were funded by the State.

With respect to the effect of the provision of public access, the complaint alleges:

104. As a result of the pedestrian boardwalks, including their failure to extend to the mean high-tide line, persons using the boardwalks have a greater incentive to stray across the adjacent private beachfront lots to reach the beach area between the mean high-tide line and the mean low-tide line.

105. Members of the general public, on a non-continuing and recurring basis, and mostly during the tourist season, use the [access areas] without authorization to trespass on the private property of the Plaintiffs owning beachfront lots and other beach-

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front lot owners, particularly on the Dry Sand Areas of such private property at which the pedestrian boardwalks terminate.

Plaintiffs describe various negative conduct resulting from the public's use of the dry sand beach in front of their homes, including litter, noise, bonfires, relief of bodily functions, requests for use of the bathroom and the telephone, and unauthorized use of plaintiffs' outdoor showers.

Based on the above allegations, plaintiffs asserted 22 claims for relief, including claims for breach of the restrictive covenants, deeds, and contracts; fraud; unfair and deceptive trade practices; and various claims relating to the maintenance of dumpsters, streets, and water supply facilities. With respect to "the State defendants," the complaint included four claims for relief. Plaintiffs first sought a declaratory judgment that the State of North Carolina and/or the public have no rights as to the dry sand beach, which plaintiffs contend is under their private ownership. Second, plaintiffs asserted a cause of action to quiet title in the dry sand beach. Third, plaintiffs requested an injunction restraining the State defendants from "interfering with these Plaintiffs' exclusive use and enjoyment of their real property, specifically the Dry Sand Areas." In the event title to the dry sand beach was not found to reside in plaintiffs, plaintiffs alternatively alleged that such a ruling would constitute a "taking" entitling plaintiffs to compensation for the land itself and for the accompanying diminution in property values.

Plaintiffs subsequently obtained leave to amend their complaint to add a fifth claim against the State defendants asserting the unconstitutionality of N.C. Gen. Stat. §§ 77-20(d) & (e) (2003), two provisions adopted after the filing of the federal action that codify the "customary free use and enjoyment of the ocean beaches" enjoyed by the people of the State of North Carolina "from time immemorial." N.C. Gen. Stat. § 77-20(d). In both the State defendants' answer to the original complaint and their answer to the amendment, they included motions to dismiss.

On 28 April 1999, upon motion by DENR, the Division of Coastal Management, and the Coastal Resources Commission, the trial court dismissed the quiet title, injunctive relief, and taking claims of those plaintiffs who did not own oceanfront property. Further, the court ruled that "all claims for relief relating to ownership and use of the ocean beach, including the Eighth Claim for Relief alleging a judicial 'taking', are DISMISSED with respect to all Plaintiffs as to lands situ-

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ated seaward of the mean high water or mean high tide line of the Atlantic Ocean. This order is entered without prejudice to the . . . Defendants [sic] right to offer the same or similar arguments in support of any future motions” Plaintiffs have not appealed this order.

On 24 July 2002, the State defendants filed a motion for judgment on the pleadings as to plaintiffs’ taking claim and their claim that N.C. Gen. Stat. §§ 77-20(d) and (e) are unconstitutional. On 9 September 2002, the State defendants also moved to dismiss the quiet title, declaratory judgment, and injunctive relief claims for lack of subject matter jurisdiction based on sovereign immunity and the absence of a justiciable controversy.

The trial court entered two orders on 22 July 2003, one addressing each motion. At this point, because of voluntary dismissals, the only remaining plaintiffs were Marvin and Patricia Fabrikant and Arthur C. Smith, III. Two additional plaintiffs had been added: MPF Investment Co., L.P. and the Arthur C. Smith III Revocable Trust. The first order dismissed plaintiffs’ quiet title, declaratory judgment, and injunctive relief claims on the basis of sovereign immunity. The second order granted the motion for judgment on the pleadings as to plaintiffs’ remaining two claims. Both orders included a certification from the trial court, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, stating: “There is no just cause for delay in the entry of a final judgment as to these claims.” Plaintiffs appealed from both 22 July 2003 orders.

[1] We first observe that this appeal is interlocutory. The trial court’s two 22 July 2003 orders dismissed only five of plaintiffs’ 23 claims, leaving the remaining 18 claims pending. “ ‘An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.’ ” *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (quoting *Veazey v. Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 375, 381 (1950) (citations omitted in original)). This Court must, as an initial matter, determine whether the appeal is properly before the Court.

An interlocutory appeal is ordinarily permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. *Id.* at 164-65, 545 S.E.2d at 261. Here,

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the trial court included a Rule 54(b) certification in both of its orders. “When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory. Nonetheless, the trial court may not, by certification, render its decree immediately appealable if ‘[it] is not a final judgment.’” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (internal citations omitted) (quoting *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983)). Since it is apparent that the dismissals of plaintiffs’ five claims against the State defendants are final judgments, plaintiffs’ appeal is properly before this Court.

Injunctive Relief and Suit to Quiet Title

[2] The plaintiffs’ sixth and seventh claims for relief are labeled in the complaint respectively: “Dry Sand Areas—Action to Quiet Title” and “Dry Sand Areas—Injunctive Relief.” We hold that these two causes of action are barred because plaintiffs have failed to properly allege in their complaint the State’s waiver of sovereign immunity.

“Sovereign immunity is a theory or defense established to protect a sovereign or state as well as its officials and agents from suit . . . when the agency or entity is being sued for the performance of a governmental function. It mandates that the state is immune from suit unless it expressly consents to be sued through a waiver . . . or, unless a statutory waiver of immunity applies.” *Vest v. Easley*, 145 N.C. App. 70, 73, 549 S.E.2d 568, 572 (2001) (internal citations omitted). See also *Shingleton v. State*, 260 N.C. 451, 458, 133 S.E.2d 183, 188 (1963) (holding that sovereign immunity precluded the trial court from granting an injunction against the State with respect to a disputed easement).

In this case, plaintiffs have sued the State of North Carolina, DENR, the Coastal Resources Commission, the Division of Coastal Management, and the Director of the Division of Coastal Management.² Plaintiffs do not dispute the applicability of the doc-

2. The complaint originally named as a defendant Roger N. Schechter “as Director of the Division of Coastal Management.” While the complaint does not specifically state whether Schechter was sued in his official or individual capacity, it is apparent from the nature of the claims, the relief sought, and the course of the proceedings that Schechter was sued only in his official capacity. *Mullis v. Sechrest*, 347 N.C. 548, 553-54, 495 S.E.2d 721, 723-24 (1998). We note that during the course of the litigation whenever the identity of the Director changed, the parties substituted the new Director as the defendant. See N.C.R. Civ. P. 25(f)(1) (“When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, . . . his successor is automatically substituted as a party.”). An official capacity suit, such as the one here, is “merely another way of pleading an action

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trine of sovereign immunity to these defendants, but contend that immunity is waived by virtue of N.C. Gen. Stat. § 44-10.1 (2003) with respect to their “action to quiet title and related relief against the State Defendants.”

Our Court has repeatedly held: “In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action.” *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). *See also Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994) (“[A]bsent an allegation to the effect that [sovereign] immunity has been waived, the complaint fails to state a cause of action.”). While this principle has been applied primarily in cases involving counties or municipalities, this Court held in *Vest*, 145 N.C. App. at 74, 549 S.E.2d at 573, that it is equally applicable in suits against the State and its agencies.

This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity. *See Lynn v. Overlook Dev.*, 98 N.C. App. 75, 79, 389 S.E.2d 609, 612 (1990), *rev’d in part on other grounds*, 328 N.C. 689, 403 S.E.2d 469 (1991). A lack of specificity in this regard is not, however, fatal in the early stages of the proceedings. *Id.* In other words, as long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary.

Plaintiffs, however, urge this Court to look beyond the complaint. This Court has already rejected such an approach:

Plaintiff contends that her failure to plead waiver of immunity through the purchase of liability insurance does not subject her claim to dismissal, and that it is sufficient to present such evidence at trial. She is wrong. . . . We [have] held that absent an allegation to the effect that immunity has been waived, the complaint fails to state a cause of action. Plaintiff’s complaint does not satisfy these pleading requirements and the trial court properly

against the governmental entity.” *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725. In other words, any claim against Schechter in his official capacity is simply a claim against the State of North Carolina.

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granted summary judgment for Burke County. Plaintiff also argues that the absence of the allegations of waiver is not fatal as long as evidence of waiver is present in the record. This Court addressed and rejected this argument in *Gunter v. Anders*, 115 N.C. App. 331, 444 S.E.2d 685 (1994) [*disc. review denied*, 339 N.C. 612, 454 S.E.2d 250 (1995)].

Clark, 117 N.C. App. at 88-89, 450 S.E.2d at 748. Based on *Clark* and *Gunter*, we are limited to reviewing the complaint and its attachments to determine whether plaintiffs have alleged sufficient facts to establish a waiver by the State defendants of sovereign immunity.

N.C. Gen. Stat. § 41-10.1, upon which plaintiffs rely, provides:

Whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land which has not been taken by condemnation and any individual, firm or corporation likewise asserts a claim of title to the said land, such individual, firm or corporation may bring an action in the superior court of the county in which the land lies against the State or such agency or department thereof for the purpose of determining such adverse claims. Provided, however, that this section shall not apply to lands which have been condemned or taken for use as roads or for public buildings.

Plaintiffs contend that their complaint's allegations fall within the scope of this statute, thereby establishing a waiver of sovereign immunity with respect to their quiet title claim and their request for injunctive relief.

[3] With respect to injunctive relief, plaintiffs' arguments are foreclosed by *Shingleton*. Although in *Shingleton*, our Supreme Court ultimately held that the plaintiff could proceed with a quiet title action under N.C. Gen. Stat. § 44-10.1, it specifically reversed the trial court's grant of injunctive relief: "The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute, G.S., Ch. 143, Art. 31). It follows that he cannot maintain an action against it to restrain the commission of a tort." *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188. The Court noted that the plaintiff was not without a remedy since he could sue the individual public officers:

When public officers whose duty it is to supervise and direct a State agency attempt or threaten to invade the property rights of a citizen in disregard of law, they are not relieved of responsibil-

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ity by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State.

Id. The Court noted, however, that none of the officers were parties to that action. Likewise, in this case, plaintiffs have sued the Director of the Division of Coastal Management only in his or her official capacity, which is simply a claim against the State. *See Mullis*, 347 N.C. at 553-54, 495 S.E.2d at 725. We are bound by *Shingleton*. Since plaintiffs have not brought any individual capacity claims, *Shingleton* precludes their request for injunctive relief.

[4] With respect to the quiet title claim under N.C. Gen. Stat. § 41-10.1, we must decide whether plaintiffs' complaint alleges that the State has asserted "a claim of title to land" with respect to any property to which plaintiffs also claim title. It is well established that a "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983). In accordance with this principle, our Supreme Court has specifically held that the courts must "constru[e] N.C.G.S. § 41-10.1 strictly." *State v. Taylor*, 322 N.C. 433, 437, 368 S.E.2d 601, 603 (1988). The Court in *Taylor* concluded, therefore, that "the phrase 'claim of title to land' contained in N.C.G.S. § 41-10.1 cannot be broadened to include a claim for betterments under N.C.G.S. § 1-340." *Id.*

In comparison, in *Shingleton*, 260 N.C. at 458-59, 133 S.E.2d at 188-89, the Supreme Court held that an action against the State under N.C. Gen. Stat. § 41-10.1 could proceed when it arose out of conflicting claims relating to a recorded easement. The Court generally defined the meaning of "claim of title to land," observing: "Every right to land is a title. If a person has the actual or constructive possession of property, or the right of possession, he has a title thereto, though another person may be the owner." *Id.* at 459, 133 S.E.2d at 189.

In *Williams v. N.C. State Bd. of Educ.*, 266 N.C. 761, 764-66, 147 S.E.2d 381, 383-85 (1966), the Supreme Court further defined the scope of N.C. Gen. Stat. § 41-10.1. Although the plaintiffs and the State each claimed title to land on the basis of a recorded deed, the Court did not rest its holding that the plaintiffs could sue on that basis alone. Instead, the Court added:

As indicated above, it appears from the allegations of both plaintiffs and defendants that defendants do not assert they

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have condemned the property. Nor do defendants assert ownership by virtue of their right of eminent domain or other attribute of sovereignty. Defendants' claims to ownership are based solely on rights and defenses available to private litigants in like circumstances.

Id. at 764-65, 147 S.E.2d at 383. *See also id.* at 767, 147 S.E.2d at 385 (in discussing the nature of the State defendants' defenses, emphasizing that "the State and its agencies are asserting no rights deriving from their governmental status").

In the present case, plaintiffs' allegations establish that they are not basing their claim for injunctive relief and their suit to quiet title upon any formal claim of title, as the plaintiffs were in *Williams* and *Shingleton*. Instead, in support of their contention that the State defendants have asserted a "claim of title to land," plaintiffs point only to allegations that members of the general public trespass over the dry sand areas and that the Schechter affidavit filed in the federal litigation, which plaintiffs attached to the complaint, stated that Schechter interpreted the public trust doctrine to allow public access to the dry sand beach.

Plaintiffs cite no authority suggesting that trespassing by members of the public constitutes a "claim of title to land" by the State. Thus, plaintiffs' contention that N.C. Gen. Stat. § 44-10.1 applies rests solely on their allegations regarding the interpretation of the public trust doctrine contained in the Schechter affidavit.

The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527-28, 369 S.E.2d 825, 828 (1988). As this Court has held, "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common. . . . They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.'" *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (emphasis omitted) (quoting N.C. Gen. Stat. § 1-45.1 (1994)).

As such, the public trust doctrine cannot give rise to an assertion of ownership that would be available to any "private litigants in like

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circumstances.” *Williams*, 266 N.C. at 765, 147 S.E.2d at 383. Any party, public or private, can assert title to land on the strength of a deed, but only the State, acting in its sovereign capacity, may assert rights in land by means of the public trust doctrine. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118, 574 S.E.2d 48, 54 (2002) (noting that “[t]he state is the sole party able to seek non-individualized, or public, remedies for alleged harm to” property covered by the public trust doctrine), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). Indeed, as the United States Supreme Court has stated, the public trust doctrine “uniquely implicate[s] [a state’s] sovereign interests.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 284, 138 L. Ed. 2d 438, 457, 117 S. Ct. 2028, 2041 (1997). Since any reliance by the State upon the public trust doctrine would constitute an interest in the property based on an “attribute of sovereignty” and not based “solely on rights and defenses available to private litigants in like circumstances,” it cannot, under *Williams*, constitute a “claim of title in land” within the meaning of N.C. Gen. Stat. § 44-10.1.

Moreover, plaintiffs cite no authority to suggest that an informal assertion of an interest in property falls within N.C. Gen. Stat. § 44-10.1. While plaintiffs cite numerous cases construing the quiet title statute, N.C. Gen. Stat. § 41-10, it is § 44-10.1 that constitutes the waiver of sovereign immunity and not § 44-10. The question is not whether plaintiffs have asserted a claim under § 44-10, but rather whether their allegations are sufficient to establish a waiver of sovereign immunity under § 44-10.1.

A comparison of the two statutes, however, supports the State defendants’ contention that plaintiffs’ allegations do not set out a claim by the State of title to plaintiffs’ land. N.C. Gen. Stat. § 41-10 provides: “An action may be brought by any person against another who claims *an estate or interest in real property* adverse to him for the purpose of determining such adverse claims” (Emphasis added.) The italicized language stands in contrast to the corresponding language in § 41-10.1: “Whenever the State of North Carolina or any agency or department thereof asserts *a claim of title to land*, . . . [an action may be brought] against the State” (Emphasis added.) Had the General Assembly intended in § 41-10.1 to waive the State’s sovereign immunity whenever the State asserted simply an “interest in real property,” it knew how to say so. *N.C. Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 538, 374 S.E.2d 844, 849 (1988) (in construing statute, noting “[t]here is no doubt that the leg-

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islature knows how to draft such language when it chooses to do so”). Since the General Assembly chose to limit the waiver to an assertion of a “claim of title to land,” rather than use the broader “interest in real property,” we must construe that language strictly and hold that a “claim of title to land” requires more than just an interest in real property. *See Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 24, 104 S. Ct. 296, 300 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”).

Thus, as to plaintiffs’ contention that something less than a claim of title is sufficient to trigger the operation of the sovereign immunity waiver, “‘[t]he short answer is that [the legislature] did not write the statute that way.’” *Id.* (quoting *United States v. Naftalin*, 441 U.S. 768, 773, 60 L. Ed. 2d 624, 630, 99 S. Ct. 2077, 2082 (1979)). Since plaintiffs’ complaint does not include allegations sufficient to establish that the State has asserted a claim of title to property owned by plaintiffs within the meaning of N.C. Gen. Stat. § 41-10.1, plaintiffs have failed to allege facts sufficient to constitute a waiver of the State’s sovereign immunity. The trial court, therefore, properly dismissed plaintiffs’ quiet title claim.

Declaratory Judgment

[5] Plaintiffs have also sought a declaratory judgment, alleging:

181. By reason of the foregoing, and specifically the State Defendants’ interpretation of the public trust doctrine and the alleged rights of the general public over the private property belonging to the Plaintiffs owning beachfront lots, and specifically the Dry Sand Areas, there exists a justiciable controversy between [plaintiffs] and the State Defendants as to whether the public trust doctrine in the State of North Carolina extends to the Dry Sand Areas, and whether the public has an implied easement over the Dry Sand Areas of these Plaintiffs’ property by virtue of the public trust doctrine, and, accordingly, pursuant to the provisions of N.C.G.S. 1-253, *et seq.*, the Plaintiffs owning beachfront property are entitled to have this Court issue its Declaratory Judgment on these issues, as set forth above, and any other issues that might arise from these proceedings.

We hold that the trial court properly dismissed this claim because plaintiffs have failed to set forth a justiciable controversy in their complaint.

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As this Court has recently recognized in a declaratory judgment action against the State, “N.C. Gen. Stat. § 1-253 provides that our courts ‘shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.’” *Nat’l Travel Servs., Inc. v. State*, 153 N.C. App. 289, 291, 569 S.E.2d 667, 668 (2002) (quoting N.C. Gen. Stat. § 1-253 (2001)). This power is not unlimited: “In actions involving a request for a declaratory judgment, our Supreme Court ‘has required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing.’” *Id.*, 569 S.E.2d at 668-69 (quoting *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986)). The requirement of an actual controversy between the parties “is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act.” *Adams v. N.C. Dep’t of Natural & Econ. Res.*, 295 N.C. 683, 703, 249 S.E.2d 402, 414 (1978).

Although our appellate courts have not specifically defined an “actual controversy,” it is well established that “[a] mere difference of opinion between the parties” is not sufficient for purposes of the Declaratory Judgment Act. *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 205, 22 S.E.2d 450, 453 (1942). This Court does not have authority “to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.” *Id.* at 204, 22 S.E.2d at 453. *See also Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) (observing that “[t]he Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice”). An actual right of action is not necessary to establish an actual controversy, but “it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough.” *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 62 (1984) (internal citations omitted).

In this case, plaintiffs’ complaint contends that an actual controversy exists because of “the State defendants’ interpretation of the public trust doctrine and the alleged rights of the general public” with respect to the dry sand beach, as set forth in the Schechter affidavit attached to the complaint. In that affidavit, Mr. Schechter, who was at that time Director of the Division of Coastal Management, stated that one of the duties of his office is the “implementation of the beach access policies of the [Coastal Resources Commission] and the Secretary of DENR, including application of the public trust doctrine to ocean beaches” Schechter explained that “[i]n the implementation of those policies,” he “appl[ies] the following standards.” He

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then described three zones of the beach and stated that “[t]he dry sand beach zone . . . can be privately owned, but is subject to public rights in the nature of an easement in favor of the general public for the use of the ocean beach.”

Plaintiffs also urge us to look at the State defendants’ answer to their complaint and the course of the litigation. This Court has previously held, however, that “our courts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy. To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable.” *State ex rel. Utils. Comm’n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62 (2002) (internal quotation marks and citations omitted). Our review is, therefore, limited to determining whether the complaint established an actual controversy.

[6] The question then becomes whether the Schechter affidavit attached to the complaint is sufficient to meet that requirement. That affidavit sets forth only the standards Mr. Schechter personally applied. Neither it nor the complaint sets forth any rule or regulation adopted by the State defendants. Likewise, nothing in plaintiffs’ complaint refers to any rule or regulation concerning the public’s use of the dry sand beaches. Moreover, neither the affidavit nor the complaint indicate that Mr. Schechter or anyone else employed by the State has either (1) applied Mr. Schechter’s standards to any of the plaintiffs’ property or (2) taken any other concrete action asserting rights in the dry sand beach.

In cases involving comparable allegations, our courts have consistently concluded that no justiciable controversy existed. For example, in *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978), the plaintiffs owned property along the Eno River in Orange County. In support of their request for a declaratory judgment that statutes providing for acquisition of land for state parks were unconstitutional, the plaintiffs alleged that (1) the defendants had announced their intention to adopt a master plan for a proposed Eno River State Park, (2) the defendants had prepared several different plans for the park, each of which encompassed property owned by the plaintiffs, and (3) the defendants had stated that the park would be established pursuant to one of the already proposed plans. The Court pointed out that “[n]one of the plaintiffs in the present action has as yet been directly and adversely affected by any statute which they seek to challenge in the

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present action” *Id.* at 690-91, 247 S.E.2d at 255 (internal quotation marks omitted). According to the Court, “[a]ll that has occurred is that employees of the Division of Parks and Recreation in the North Carolina Department of Natural and Economic Resources have made initial alternative planning proposals for a State park which contemplate ultimate acquisition of certain lands of the plaintiffs for park purposes.” *Id.* at 691, 247 S.E.2d at 255. The Court concluded that there was “[a] mere difference of opinion between the parties” that did not demonstrate the existence of a genuine controversy cognizable under the Declaratory Judgment Act. *Id.* See also *Town of Tryon*, 222 N.C. at 205, 22 S.E.2d at 453 (“A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utilities of the defendant—without any practical bearing on any contemplated action—does not constitute a controversy within the meaning of the cited cases.”).

Similarly, in *Nichols v. Lake Toxaway Co.*, 98 N.C. App. 313, 390 S.E.2d 770, *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990), the plaintiffs contended that a justiciable controversy existed as to the existence of a right of first refusal as to the plaintiffs’ property when the defendant company mailed a letter to all property owners in a development stating that the defendant had a right of first refusal on all property within the development. This Court held, however: “This general letter, targeted at no one in particular and not alluding to any legal recourse that would be taken if the residents did not comply with the terms of their deeds, is not the makings of an ‘actual controversy’ ripe for declaratory judgment.” *Id.* at 316, 390 S.E.2d at 772.

In *Adams*, the plaintiffs based their claim of an actual controversy on the fact that the Coastal Resource Commission had designated their land as an “interim” area of environmental concern and as a “conservation area.” 295 N.C. at 703, 249 S.E.2d at 414. According to the plaintiffs, these designations meant that applications for development permits would likely be denied in the future, thereby impairing the usefulness and value of their property. After noting that the Commission would have to engage in various further administrative proceedings before any permits could be denied and that plaintiffs had not yet, in any event, had occasion to seek development permits, variances, or exemptions, the Court held: “[T]here is no justiciable controversy . . . entitling plaintiffs to relief under the Declaratory Judgment Act.” *Id.* at 705, 249 S.E.2d at 415.

We find plaintiffs’ allegations immaterially different from those deemed insufficient in *Barbour*, *Nichols*, and *Adams*. Here, at most,

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plaintiffs have alleged a statement by a single State official asserting a standard that he himself applies generally, which has not, through any specific action, been applied to plaintiffs' particular property. Compare, e.g., *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 213, 443 S.E.2d 716, 724 (1994) ("We do not require that the challenged regulation have taken effect, only that it have been enacted or adopted by the administrative agency. . . . Further, we require that plaintiffs be directly and adversely affected by the regulation."). In contrast to the above cases, the Schechter affidavit does not even threaten to take any action with respect to any specific parcel of land that plaintiffs own. Nor does it threaten any action should plaintiffs attempt to limit public access to the dry sand beach.

In short, at best, plaintiffs have asserted a difference of opinion between them and Mr. Schechter regarding the application of the public trust doctrine to the dry sand beach. Plaintiffs are asking us to render an opinion resolving the abstract issue whether the public trust doctrine gives rise to a public easement over the dry sand beaches of our State. In the absence of allegations in the complaint demonstrating an attempt by the State to enforce, with respect to plaintiffs, its alleged opinion regarding the dry sand beach, we do not have jurisdiction to do so. Neither did the superior court. The trial court, therefore, properly dismissed plaintiffs' request for a declaratory judgment.

Plaintiffs' Constitutional Claims

[7] Plaintiffs next argue that "[f]or any court of this State to declare that the general public [has] an implied easement for which the Property Owners need not be compensated would be an unconstitutional taking or deprivation of property without due process." Plaintiffs' eighth claim for relief, addressing this theory, states, in pertinent part:

In the event this Court declares that the State, and therefore the general public, have an implied easement over the Dry Sand Areas of the real property belonging to the Plaintiffs owning beachfront lots, the establishment of such an easement for a public purpose constitutes a taking of these Plaintiffs' real property without compensation

The parties have identified this as a "judicial takings" claim.

Because of our disposition of plaintiffs' quiet title and declaratory judgment claims based on sovereign immunity and the lack of a justi-

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cialable controversy, we need not address the merits of this claim for relief. Dismissal of a claim is proper when the claim is conditioned on the finding of liability under another separate claim, and no such underlying liability was found. *See Huyck Corp. v. C.C. Mangum, Inc.*, 309 N.C. 788, 793-94, 309 S.E.2d 183, 187 (1983). Accordingly, the trial court properly dismissed plaintiffs' judicial taking claim.

[8] Plaintiffs amended their complaint to add an additional constitutional claim: that N.C. Gen. Stat. §§ 77-20(d) & (e) constitute an unconstitutional taking of property to the extent the subsections may be construed to grant the public an easement over the dry sand beach. In the proceedings below, the State represented that it was not contending that the statutory subsections created rights in the public to the dry sand beach. Plaintiffs orally responded:

In view of the State's position today that that is not their interpretation of [N.C. Gen. Stat. §§ 77-20 (d) & (e)], if they're making that representation to the Court and therefore, disclaiming any reliance on 77-20 for the purpose of creating a public recreational easement, we can usually consent to dismissal of the 23rd Claim for Relief. . . . *And we can again at the Court's wish, we can either enter into a stipulation to the effect of dismissing the 23rd Claim for Relief or have the Court dismiss it based on the representations made by the State today.*

(Emphasis added.)

On appeal, plaintiffs do not argue the merits of this claim for relief. Rather, they contend that the trial court erred in dismissing that claim when "[t]he proper disposition was to have a stipulated dismissal in which the State's undertaking not to rely upon section 77-20(d) & (e) was recorded, or at a minimum, that the State's stipulation be noted on the face of the court's Order." Plaintiffs, however, gave the trial court the option to dismiss the claim outright rather than enter a stipulated dismissal. "A party may not complain of action which he induced." *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994).

Further, plaintiffs cite no authority in support of their argument that they are entitled to a "stipulated dismissal" in lieu of the order dismissing their claim on the merits. "Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6). We, therefore, overrule this assignment of error.

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Affirmed.

Judges CALABRIA and STEELMAN concur.

SUNBELT RENTALS, INC., PLAINTIFF-APPELLEE v. HEAD & ENGQUIST EQUIPMENT, L.L.C., D/B/A H&E HI-LIFT, ROBERT HEPLER, DOUGLAS KLINE, MICHAEL QUINN, GREGG L. CHRISTENSEN, PATRICK C. MULDOON, MICHELE U. DOUGHERTY, AND BRIAN W. PEARSALL, DEFENDANT-APPELLANTS

No. COA04-862

(Filed 18 October 2005)

1. Trade Secrets— compiled business information—construction equipment rental business

The trial court did not err by concluding that plaintiff's compilation of business information constitutes a trade secret. The trial court determined that the disputed information was not generally known outside the company, was only discreetly disclosed within the company, was guarded as a secret, was competitively valuable, was developed at significant cost; and was difficult to acquire or duplicate.

2. Trade Secrets— construction rental companies—hiring branch managers—using confidential information

The trial court did not err in an action between construction equipment rental companies by finding that defendants misappropriated trade secrets and violated the Unfair and Deceptive Trade Practices Act through the hiring of branch managers who used plaintiff's confidential information to obtain sales and convert former customers. N.C.G.S. § 66-152; N.C.G.S. § 75-1.1.

3. Unfair Trade Practices— damages—hiring of branch managers and use of confidential data—misappropriation of trade secrets and unfair practices—lost profits and benefit received

The trial court did not err by finding that defendant's hiring of plaintiff's branch managers and their use of confidential data proximately caused plaintiff's damages for misappropriation of trade secrets and unfair and deceptive trade practices. Moreover, under the Unfair and Deceptive Trade Practices Act, lost profits

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and the benefit defendant received are different types of damages and the award of both is permitted.

4. Laches— misappropriation of trade secrets from purchased company—no delay in action

Plaintiffs were not barred by laches from seeking relief for a competitor's hiring of its managers and the misappropriation of trade secrets. There was no delay in bringing the action and no prejudice.

Appeal by defendants from an order dated 13 August 2003 by Judge Ben F. Tennille in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 3 March 2005.

Helms, Mulliss & Wicker, P.L.L.C., by E. Osborne Ayscue, Jr., Irving M. Brenner, Catherine E. Thompson and Paul M. Navarro, for defendant-appellants.

Parker, Poe, Adams & Bernstein, L.L.P., by Jack L. Cozort, William L. Rikard, Jr., Eric D. Welsh, Deborah L. Edney and Heather N. Oakley, for plaintiff-appellee.

BRYANT, Judge.

Head & Engquist Equipment, L.L.C., (d/b/a H&E Hi-Lift), Robert Hepler, Douglas Kline, Michael Quinn, Gregg L. Christensen, and Brian W. Pearsall, (collectively defendants) appeal from an Order and Opinion dated 13 August 2003 finding defendants jointly and severally liable to Sunbelt Rentals, Inc. (plaintiff) under the North Carolina Trade Secrets Protection Act (NCTSPA) and the N.C. Unfair and Deceptive Trade Practices Act (UDTPA). Plaintiff was awarded damages¹ in the amount of \$16,200,000.00, plus pre- and post-judgment interest of eight percent.

Procedural History/Facts

This dispute arose between corporate parties who are competitors in the market for the rental of construction equipment, specifically aerial work platforms (AWP). The business of renting AWP equipment and the pricing of such equipment is extremely competitive. Sunbelt Rentals, Inc. (plaintiff) purchased BPS Equipment Rental and Sales (BPS) in June 2000. Former employees of BPS are named as individual defendants in this action: Robert Hepler

1. \$5,000,000.00 in damages which were trebled to \$15,000,000.00 and attorney's fees in the amount of \$1,200,000.00.

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(President), Douglas Kline (Vice President of Finance), Michael Quinn (Senior Manager), Gregg L. Christensen (Dallas Western Regional Manager) and Brian W. Pearsall (Charlotte Branch Manager).

In August 1999, Hepler and Kline learned via the internet that BPS was to be sold. Together, they developed an Aerial Equipment Specialists Plan (AES Plan) which included specific fleet mixes for each of the proposed branches to coincide with the local rental markets, including specific employee compensation rates which were “formulated by experience in each of the markets to maximize utilization.” Hepler and Kline were unsuccessful in their attempt to sell the AES Plan. In November 1999, Hepler and Kline resigned from BPS and in December 1999 began working for H&E’s Hi-Lift Division. Hepler was employed as President, while Kline was employed as Executive Vice President and Chief Financial Officer. Hepler and Kline, while performing in a similar capacity as they had at BPS, began to implement their AES Plan for H&E in seven southeastern cities including: Atlanta, Charlotte, Orlando, Dallas, Houston, Tampa/Fort Meyers, and Fort Lauderdale. A major concern of H&E in implementing the AES plan was the availability of the right personnel to “grow the business.” By June 2000, former BPS branch managers in Atlanta, Charlotte, Tampa/Fort Meyers, and Orlando had been recruited and hired by H&E to perform similar duties within their respective geographical areas. H&E had no previous market presence in Atlanta, Charlotte, Orlando, Dallas, Houston, Tampa/Fort Meyers, or Fort Lauderdale. In each location, after the conversion of former BPS branch managers, a significant number of key BPS personnel², if not all, were employed by H&E.

On 14 July 2000 plaintiff filed this action asserting claims for: breach of fiduciary duty; aiding and abetting breach of fiduciary duty; tortious interference with prospective relations; violation of the North Carolina Trade Secrets Protection Act; violation of the North Carolina Unfair Trade Practices Act; and civil conspiracy. The case was assigned to the North Carolina Special Superior Court for Complex Business Cases.

2. In Atlanta, by opening day in March 2000, every one of the fifteen employees of H&E’s Atlanta branch had been hired from BPS; in Charlotte, by 5 June 2000, nine BPS staff were employed by H&E; in Orlando, by 22 May 2000, H&E employed BPS’ entire outside sales staff; in Houston, by March 2000 H&E solicited and hired eight BPS employees; in Tampa/Fort Meyers, by 5 June 2000 H&E hired twenty-five BPS employees and over ninety percent of H&E employees in Tampa/Fort Meyers were former BPS employees; and in Dallas, by 20 March 2000 H&E hired nine BPS employees.

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In an Opinion and Order dated 10 July 2002, Judge Ben F. Tennille granted partial summary judgment dismissing the breach of fiduciary duty claims against all defendants. The claim of aiding and abetting breach of fiduciary duty against H&E was also dismissed. The remainder of the claims proceeded to trial before Judge Tennille. At the close of plaintiff's evidence, the trial court granted Patrick C. Muldoon and Michele U. Dougherty's Rule 41(b) motion to dismiss all claims against them. On 2 May 2003 Judge Tennille entered an Order and Opinion ruling the remaining defendants were jointly and severally liable for each of the remaining claims with the exception of tortious interference with prospective relations. The trial court awarded damages of \$5,000,000, which it then trebled under N.C. Gen. Stat. § 75-16 (2003). By Order entered 31 July 2003, the trial court also awarded plaintiff's attorney's fees of \$1,200,000.00 under N.C. Gen. Stat. § 75-16. On 13 August 2003 Judge Tennille entered a final judgment for \$16,200,000.00 together with pre-judgment and post-judgment interest of eight percent. Defendants appeal³.

Defendants raise four issues on appeal: whether the trial court erred in (I) concluding plaintiff's compilation of business information constitutes a trade secret under N.C. Gen. Stat. § 66-152 (N.C. Trade Secrets Protection Act) and that defendants misappropriated trade secrets; (II) finding defendants violated N.C. Gen. Stat. § 75-1.1 (Unfair and Deceptive Trade Practices Act); (III) finding a proximate cause connection between plaintiff's lost profits and defendants' conduct in determining plaintiff's damages (and the trebling of such damages); and (IV) concluding plaintiff's claims of unlawful conduct were not barred by laches.

Standard of Review

Since this appeal involves a bench trial, findings of fact made by the trial court have the "force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them[.]" *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979). Appellate review of the trial court's conclusions of law is *de novo*. *McConnell v. McConnell*, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002).

3. Plaintiff filed a Cross Notice of Appeal solely on the issue of damages yet fails to argue this issue in its brief, therefore, this assignment of error is deemed abandoned. N.C. R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

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We will consider the applicable findings and conclusions according to defendants' assignments of error. We note the extensive number of assignments of error which defendants do not argue. Therefore, we grant plaintiff's 21 October 2004 motion to exclude from consideration defendants' unargued assignments of error based on N.C. R. App. P. 28 (b)(6) and deem those assignments of error abandoned.

I

[1] Defendants first argue the trial court erred in concluding plaintiff's compilation of business information constitutes a trade secret under N.C. Gen. Stat. § 66-152 (N.C. Trade Secrets Protection Act).

A trade secret is business or technical information that "[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development . . . and [is] the subject of efforts that are reasonable under the circumstances to maintain its secrecy." N.C. Gen. Stat. § 66-152(3)(a)-(b) (2003). Factors to consider when determining whether an item is a trade secret are:

(1) the extent to which information is known outside the business; (2) the extent to which it is known to employees and others involved in the business; (3) the extent of measures taken to guard secrecy of the information; (4) the value of information to business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

State ex rel. Utils. Comm'n v. MCI, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (citation omitted). Applying these factors, our courts have found the following to constitute a trade secret: cost history information⁴; price lists⁵; and confidential customer lists, pricing formulas and bidding formulas⁶.

On the issue of whether plaintiff's compilation of business information constitutes a trade secret, defendants assign as error only the following four findings of fact:

4. See *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 542 S.E.2d 689 (2001).

5. See *Wilmington Star-News v. New Hanover Reg'l Med. Ctr.*, 125 N.C. App. 174, 179, 480 S.E.2d 53, 56 (1997).

6. See *Drouillard v. Keister Williams Newspaper Servs.*, 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992).

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(16) AWP managers and salespeople know, from experience or simply by asking their customers, what type of equipment is needed by the different types of contractors for particular jobs. For example, electrical contractors will often use smaller scissor lifts or push-around lifts that can fit through interior doorways, while glass manufacturers working on the outside of buildings need taller boom lifts which can range up to 120 feet in height. Knowledge of the company's customer base contributes to higher utilization of equipment and better selection of the "fleet mix" for a particular market. Such information allows a business to invest in certain machines that yield better rates and profits. A new market entrant has a significant advantage if it has access to that information. With such information, a new entrant can maximize its initial fleet investment with little risk, perhaps saving millions of dollars, and can accurately project an operating budget.

...

(23) In terms of price, historical prices have limited value. Prices are quoted and then negotiated between the outside sales representative and the customer or over the telephone with inside sales coordinators. While salesmen would like for prices to remain "confidential," they understand and expect that prices will become known in the market. Customers do not consider quoted prices to be confidential and often reveal price sheets and quoted prices of competitors to obtain more favorable terms. AWP rental companies occasionally quote good customers a fixed price for a job or period of time; these arrangements would constitute confidential information. "Sealed bids" or other formal bidding processes are rarely used. Recent consolidation in the industry has made pricing extremely competitive and has created several large competitors.

...

(42) During Hepler's tenure as [BPS'] president, the senior management team met regularly, at least once per month. At its meetings, the senior management team discussed customers, mechanic availability, sales personnel, equipment utilization, safety, marketing, product mix, average rental rates, planning and other matters. Branches were regularly evaluated branch-by-branch. Senior management regularly shared BPS marketing, customer and internally developed information. This information included head counts, salary information, pricing,

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organizational structure, financial projections and forecasts, cost information, branch budgets and customer information, including the identity, contacts and requirements of its rental customers, pricing in effect for those customers and fleet utilization information by branch. Senior management knew that this information was confidential.

(43) Defendants Hepler and Kline managed the day-to-day affairs of BPS, made strategic decisions, developed and implemented budgets and hired and fired employees. Hepler was involved in all levels of the business. He frequently visited branches, discussed up and coming job sites and sales personnel and was actively involved with customers. Kline was involved in all aspects of the business as the result of his financial responsibilities. In particular, he was extensively involved with branch managers in budgeting. Hepler and Kline were highly compensated. Hepler was paid a salary of \$260,000 in 1999, and Kline was paid a salary of \$160,000 to manage 24 branch operations throughout the Southeast and South Central United States. They had access to and knowledge of BPS'[] confidential business information.

Defendants argue plaintiff's "compilation of broad generalized categories of ever-changing business information" does not qualify as a trade secret. We disagree. Plaintiff considered the following to be confidential: its customer information, preferred customer pricing, employees' salaries, equipment rates, fleet mix information, budget information and structure of the business. The trial court determined such information was (1) not generally known outside BPS; (2) only discreetly disclosed within BPS; (3) guarded as secret (e.g. information removed from view when outsiders visited BPS' premises, pricing kept in special books, passwords used to protect computer access, file removal rules, and salary information kept under lock and key); (4) competitively valuable; (5) developed at significant cost to BPS; and (6) difficult to duplicate or acquire. In reaching such determinations, the trial court made numerous findings and conclusions as to defendants' lack of credibility, which defendants do not assign as error. Specifically, the trial court found with respect to testimony regarding the existence of defendants' "plan to raid BPS' key branches in an orchestrated manner and the use of the branch managers to do so . . . [that] the uncontroverted actions [spoke] louder than words of denial[.]" See *e.g., Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 246, 468 S.E.2d 600, 603 (1996) (trial

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court determines witness credibility and weight to be given their testimony). With respect to trade secrets, the trial court found:

(1) BPS/Sunbelt's compilation of information, including its special pricing information, customer information (identity, contacts and requirements of its rental customers), personnel and salary information, organizational structure, financial projections and forecasts, utilization rates, fleet mix by market, capital and branch budget information, and cost information, when taken together constitute[] trade secrets and (2) that the defendants misappropriated BPS/Sunbelt's trade secret information unlawfully.

Further, the trial court concluded:

First, while there is some direct evidence of the purloining of documents or other written confidential information, the reality is that Hi-Lift hired the people from BPS/Sunbelt who had the expertise to run an AWP business effectively and they hired the salesmen who knew the customers and the market. Pricing information was of fleeting long-term [sic] value as the market was intensely competitive. Short-term pricing or special account pricing was of more value. Most of the information about fleet usage was in the heads of the key management people hired away. They knew the essential needs to get up and running, and, if they did not, the salesmen who were hired knew the customer requirements.

We therefore hold the trial court did not err in concluding plaintiff's compilation of business information constitutes a trade secret.

[2] Defendants also challenge the trial court's finding that defendants misappropriated trade secrets. N.C. Gen. Stat. § 66-152 (1) defines misappropriation of a trade secret as "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C.G.S. § 66-152 (1) (2003).

With respect to misappropriation of trade secrets, defendants assign as error findings of fact which relate to the hiring of BPS branch managers who used the confidential information of BPS to obtain sales and convert former BPS customers to H&E. Defendants

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specifically assign error to the trial court's finding regarding their "astounding" profit:

(251) Hi-Lift rentals increased by \$30.8 million, or 130 percent, to \$55.4 million in fiscal year 2001 over fiscal year 2000. Thus, in fiscal year 2001, Hi-Lift had almost eight times the revenue it had as of December 31, 1999. As stated by an industry expert, such results are "astounding." Moreover, the [c]ourt finds that these results confirm a number of points including:

(a) The mass departures severely injured Sunbelt, a result that could only have been intended by defendants or the product of callous disregard for the consequences.

(b) Sunbelt/BPS' confidential business information was used by defendants; otherwise, their personnel could not have [] assembled so much business so quickly and efficiently.

. . .

(d) Defendants' activities were unfair, unethical and anticompetitive.

We note for the record defendants do not assign error to finding of fact number 251(e): "[Defendants'] actions resulted in a dramatic \$3.7 million turnaround in performance in one year." In addition, defendants assign as error conclusions of law made by the trial court which focus on the circumstantial nature of the evidence pointing to the misappropriation of BPS' trade secrets as follows:

(287) The evidence shows that the individual defendants knew BPS/Sunbelt's trade secrets and had access to them, and each had the opportunity to acquire them for disclosure and use. Prior to appropriating BPS employees, *en masse*, H&E had no customers in North Carolina, Georgia, or Florida. Despite this fact, the "new" H&E operations made a significant profit in their first year of operation—based on their taking of BPS/Sunbelt employees, trade secrets and customers—and the BPS branches experienced a concurrent, substantial decrease in business. This occurrence alone is circumstantial evidence of the defendants' use and disclosure of BPS trade secret information. Here, testimony supports that [d]efendant[s] misappropriated confidential customer information of BPS—testimony that [defendants] never rebutted. In addition, testimony of witnesses located in Tampa[/] Fort Myers, Dallas and Atlanta supports that confidential customer

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information was misappropriated by BPS employees who left and went to H&E. Indeed, in Tampa, identical confidential pricing was used by [a former BPS employee] after she went to H&E, and in Dallas, [another former BPS employee] took sales notes with him, even though he was purportedly instructed not to do so.

(Citations omitted) (emphasis in original). There was significant evidence before the trial court that defendants used and disclosed BPS' trade secrets. Under the NCTSPA, to show a *prima facie* case for misappropriation of trade secrets, a plaintiff must meet the burden of introducing substantial evidence that defendant "(1) [k]nows or should have known of the trade secret; and (2) [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C. Gen. Stat. § 66-155 (2003). An example of plaintiff's *prima facie* showing of misappropriated trade secrets follows: prior to hiring BPS' employees, defendants had no customers in North Carolina, Georgia or Florida; however, defendants' actions resulted in a \$3.7 million turnaround⁷ during 2001, while BPS branches in those same locations during that time experienced a concurrent, substantial decrease in business. In addition, there was no evidence defendants had a unified pricing structure at the time defendants began calling customers in North Carolina, Georgia or Florida. In fact, there is no evidence that defendants had independent business development in any of the new markets. Former BPS customers were rapidly identified, converted to defendant-H&E's customer base and extended credit based on knowledge obtained through BPS' former employees. Defendants failed to rebut this evidence establishing a *prima facie* case of misappropriation of trade secrets. For the reasons stated herein, these assignments of error are overruled.

II

Defendants next argue the trial court erred by finding defendants violated N.C. Gen. Stat. § 75-1.1 (UDTPA)⁸.

7. The trial court found "[a]s of December 31, 1999, H&E's AWP fleet had only generated rental revenue of \$ 7.2 million, a gross profit of only \$ 2.5 million and a pre-tax loss of \$ 289,000.00. The results of H&E's employment of Hepler, Kline, Christensen and Quinn and their conspiratorial activities, were that Hi-Lift realized \$ 23.4 million dollars in rentals by December 31, 2000, a gross profit of \$ 16.9 million and a pre-tax profit of \$ 3.4 million."

8. Subsumed in plaintiff's UDTPA claim, the trial court found plaintiff proved its tortious interference with prospective advantage claim. *Roane-Barker v. S. Hosp.*

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Our Supreme Court has stated, “under N.C.G.S. § 75-1.1, it is a question for the jury as to whether the defendants committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice[.]” *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 187 n.2, 437 S.E.2d 374, 377 n.2 (1993) (citing *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988)). Under North Carolina’s UDTPA a plaintiff must prove “(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998); N.C. Gen. Stat. § 75-1.1 (2003). A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145 (4th Cir. 1987) (citing *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)).

In the present case, the trial court found as fact, and the parties do not dispute, that plaintiff and defendants were competitors in the AWP rental business which affected commerce. After examining whether the acts of which plaintiff complains were unfair, unethical or unscrupulous, and effectively caused plaintiff’s injury, the trial court concluded “[t]he surreptitious and intentional use of BPS employees to solicit other key employees while both the soliciting and solicited employees were still employed by BPS is an unfair trade practice.” The trial court’s conclusion was based on a number of findings that are fully supported by evidence in the record. For example, defendants told customers BPS’ name had changed to H&E. Defendants used BPS’ lease contracts and pricing information, inserting their company name on the documents. Newly hired H&E employees deleted BPS job information and forwarded BPS phones to H&E upon leaving BPS employment.

Further evidence showed key BPS employees were solicited to work for defendants *en masse*. In Atlanta, while still employed by BPS, an employee assisted defendants in securing a facility for Hi-Lift’s branch. A few days later, the employee resigned from BPS

Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990) (by recruiting and hiring the plaintiff’s employees, soliciting plaintiff’s customers, and inducing salesmen to interfere with plaintiff’s existing accounts, defendants had tortiously interfered with contracts or prospective contracts; such interference also violated N.C. Gen. Stat. § 75-1.1); *Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644-45 (1992); *Walker v. Sloan*, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241 (2000).

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and was told by another former BPS employee that his resignation would help cause instability at BPS in order to recruit others from BPS to join Hi-Lift. A few months later, every employee working in the Atlanta branch had been hired from BPS. Defendant-H&E's common pattern in opening new branches was to hire the BPS branch managers, direct them to recruit the top BPS personnel with little notice to BPS of the employees' departures. Based on past relationships with Hepler, BPS managers and their staff used knowledge previously acquired at BPS to perform work for defendant-H&E in the same geographical location and with the same customers. In keeping with this pattern, key BPS employees were lured away with sign-on bonuses and high compensation packages. By using former BPS employees and confidential information, defendant-H&E was able to tailor rental fleets at its branches without spending the time, money and effort necessary to develop such information. In fact, the actual profits generated by defendants' greenfields⁹ should have taken much longer than it actually did (e.g. months, rather than days). Not only did defendants profit, but BPS branches were severely impacted, or "crippled," to the point BPS' opportunity and ability to compete for key employees on a level playing field was completely eliminated. Defendants' acts were unfair and unscrupulous and caused injury to plaintiff. The trial court concluded:

The appellate court decisions dealing with unfair competition and conversion of business and employees demonstrate an awareness that competition is healthy and not to be unduly discouraged. Those decisions also evidence a desire to permit employees the greatest freedom of movement in order to maximize their job opportunities. . . . Nothing in this opinion should be read to depart from the trends evident in those decisions. Hepler and Kline were free to compete fairly, and each employee of BPS/Sunbelt was free to work for the employer he or she selected. The surreptitious way in which the BPS employees were solicited may have actually deprived them of the opportunity to see what Sunbelt would offer them to stay. None of the converted employees had the right to use BPS/Sunbelt confidential business information, but they could use the experience and contacts they had gained from years in the AWP business. The manner in which the branch managers were used was deceptive. That deception prevented fair competition for both employees and customers. The deceptive, secretive nature of defendants' actions differenti-

9. A greenfield is a startup branch in a market where there has been no prior presence.

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ates this case from others where courts have found the hiring of competitor's employees to be acceptable.

(Citations omitted). "[T]he fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others." *United Labs.*, 102 N.C. App. 484, 491, 403 S.E.2d 104, 109 (citations omitted), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993). In this case, defendants' particular conduct devastated, rather than competed with, plaintiff's existing AWP sales business in violation of the Unfair and Deceptive Trade Practices Act. This assignment of error is overruled.

III

[3] Defendants next contend the trial court erred in awarding damages to plaintiff. Defendants argue that there is no proximate cause between plaintiff's lost profits and defendants' conduct. Defendants also argue the trial court erroneously calculated the damages even if plaintiff's trade secrets have been misappropriated.

Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions. *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 232, 314 S.E.2d 582, 584-85 (1984). Plaintiffs must prove damages to a reasonable certainty. *State Props., L.L.C. v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002). In cases where a claim for damages from a defendant's misconduct are shown to a reasonable certainty, the plaintiff should not be required to show an exact dollar amount with mathematical precision. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 75 L. Ed. 544 (1931); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 90 L. Ed. 652 (1946); *see also Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 462, 553 S.E.2d 431, 440 (2001) (noting that while the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required).

Defendants argue damages were speculative in that defendant-H&E did not make a profit in its first year. They assert the trial court violated N.C. Gen. Stat. § 66-154 because it awarded duplicate damages. Defendants incorrectly assert the trial court awarded plaintiff

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duplicate damages. The trial court awarded damages under the UDTPA, not the NCTSPA. Under the UDTPA, plaintiff was awarded lost profits and the value of benefit defendants received, two different types of damages permitted under the UDTPA. N.C. Gen. Stat. § 75-16 (“If any person shall be injured or the business of any . . . corporation shall be broken up . . . or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, . . . if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.”).

Plaintiff’s damages expert, Charles Phillips (Phillips) measured plaintiff’s damages on the basis of (1) lost profit and (2) lost market share resulting from defendants’ accelerated market entry in the amount of \$31,647,391.00 over several years. Our court has previously addressed similar damages as to a UDTPA claim:

Plaintiff was entitled to recover damages which were the natural and probable result of the tortfeasor’s misconduct. Plaintiff showed 1. the sales and gross profits made by the salesmen to its customers during their last year of employment with plaintiff; 2. the sales plaintiff made to these same customers during the two-year period after the salesmen were employed with defendant, which was the period of the restrictive covenants; 3. the sales the salesmen made to those same customers during that two[-]year period on behalf of the defendant. [Defendants’] sales were made in the same geographic area and to the same customers as plaintiff’s sales would have been. This evidence was both relevant and admissible. It was for the jury to decide how much weight to give such evidence. Plaintiff was entitled to show evidence of its lost profits by comparing its past history of profits with gross sales of plaintiff’s former salesmen while working for defendant.

Roane-Barker v. S. Hosp. Supply Corp., 99 N.C. App. 30, 40, 392 S.E.2d 663, 669-70 (1990) (citation omitted). Under the UDTPA, proximate cause is a question of fact. *See American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 640 F. Supp. 1411, 1445 (E.D.N.C. 1986).

The trial court did not err in finding defendants’ acts were the proximate cause of plaintiff’s damages based on the misappropriation of trade secrets and unfair and deceptive trade practices. This assignment of error is overruled.

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IV

[4] In their final argument, defendants contend plaintiffs are barred from seeking relief by the doctrine of laches.

“The doctrine of laches requires a showing (1) that petitioner negligently failed to assert an enforceable right within a reasonable period of time, and (2) that the propounder of the doctrine was prejudiced by the delay in bringing the action.” *Costin v. Shell*, 53 N.C. App. 117, 130, 280 S.E.2d 42, 44 (1981) (citing *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 192 S.E.2d 449 (1972); *Rape v. Lyerly*, 287 N.C. 601, 215 S.E.2d 737 (1975)). The burden of proof is on the party who pleads the affirmative defense of laches. *Taylor v. Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). The statute of limitations applicable to the misappropriation of trade secrets is three years. N.C. Gen. Stat. § 66-157 (2003).

Plaintiff commenced this action on 13 July 2000, less than six weeks after Sunbelt's purchase of BPS was completed (on 1 June 2000). Plaintiffs filed their action well within the three year statute of limitations period which began from the time plaintiff had knowledge of defendants' improper conduct, as early as November 1999. As there was no delay in bringing the action, there can be no prejudice therefrom. This assignment of error is overruled.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

WOLFGANG E. LOHRMANN, M.D., PLAINTIFF-APPELLANT v. IREDELL MEMORIAL HOSPITAL INCORPORATED D/B/A IREDELL MEMORIAL HOSPITAL'S HEALTH CARE SYSTEM, DEFENDANT-APPELLEE

No. COA04-1373

(Filed 18 October 2005)

1. Hospitals and Other Medical Facilities— bylaws—contract with doctor

There was no issue of fact as to whether defendant-hospital's bylaws constituted a contract with a doctor whose staff privileges were suspended.

2. Hospitals and Other Medical Facilities— suspension of medical privileges—bylaws not breached

There was no genuine issue of material fact on the question of whether defendant-hospital breached its bylaws in suspending plaintiff's medical privileges, and summary judgment was properly granted for defendant. Although plaintiff contended that handwritten notes from nurses did not properly request corrective action under the bylaws, the person requesting the correction was the CEO, who addressed the Executive Committee with the notes from the nurses in hand. These complaints referred to the specific activities which constituted the grounds for the request. The CEO's request, though not in writing, was supported by the written complaints of nurses that referred to specific activities or conduct.

3. Hospitals and Other Medical Facilities— suspension of medical privileges—bylaws not breached—applicable to formal hearing

A hospital complied with its bylaws in suspending a doctor's staff privileges where the doctor contended that he had not been given copies of nurses's complaints and notice of an executive committee meeting at which those complaints were considered. The bylaw provision cited by the doctor does not apply to the process of investigating physician conduct, but to the formal hearing and appellate review subsequent to an adverse Executive Committee recommendation. Moreover, as to the hearing, none of the investigatory steps provided by the bylaws were omitted.

4. Physicians and Surgeons— suspension of staff privileges— notice of charges

A doctor whose staff privileges were suspended by a hospital had sufficient notice of the charges against him to be able to present facts and defend his conduct at a hearing before a panel of medical staff members. Although he argued that he had not received notice that his conduct was "disruptive," the issues regarding his care of patients were the same throughout the proceedings, whatever the label.

5. Civil Procedure— findings made during preliminary injunction—not binding at trial

The findings of fact made during a preliminary injunction proceeding are not binding at a trial on the merits, and the trial court

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here did not err by determining that there was no genuine issue of material fact and awarding summary judgment for defendant.

6. Hospitals and Other Medical Facilities— suspension of medical privileges—grounds

N.C.G.S. § 131E-85 provides that a hospital may take into account the judgment and character of a physician, as well as the reasonable objectives and regulations of the hospital, in suspending a physician's privileges. In this case although plaintiff contended that his privileges were suspended solely for violating patients' rights concerning living wills and control of decisions, other factors were clearly at issue throughout the corrective proceedings.

7. Hospitals and Other Medical Facilities— suspension of doctor's privileges—not unreasonable or unfair

A hospital's decision to suspend a doctor's staff privileges was not arbitrary and capricious or based on irrelevant considerations, and was based upon the reasonable objectives and regulations of the hospital.

Appeal by plaintiff from judgment entered 22 June 2004 by Judge Mark E. Klass in Superior Court, Iredell County. Heard in the Court of Appeals 16 August 2005.

Smith Moore LLP, by Samuel O. Southern and Harriett Twigg Smalls; and Eisele, Ashburn, Greene & Chapman, P.A., by Douglas G. Eisele for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Anthony H. Brett and Donald R. Esposito, for defendant-appellee.

McGEE, Judge.

Wolfgang Lohrmann, M.D. (Dr. Lohrmann) filed suit against Iredell Memorial Hospital, Incorporated (Memorial Hospital) when Memorial Hospital's governing body suspended Dr. Lohrmann's medical staff privileges in early 2003. Dr. Lohrmann alleged breach of contract, failure to comply with N.C. Gen. Stat. § 131E-85, and violation of his rights to substantive and procedural due process of law.

Dr. Lohrmann was a medical doctor practicing in Iredell County in the speciality of nephrology, dealing with diseases of the kidney. Memorial Hospital was a nonprofit organization located in Statesville,

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North Carolina, licensed to conduct business as a hospital for the general public. Dr. Lohrmann was a member of the medical staff at Memorial Hospital and exercised medical staff privileges in nephrology. Memorial Hospital's corporate bylaws and medical staff bylaws permitted Memorial Hospital to take corrective action against members of its medical staff. The bylaws stated that corrective action could include suspension of medical staff privileges.

In February and March 2002, Dr. Lohrmann provided care and treatment to Ms. S and Mr. W, two Memorial Hospital patients. Ms. S was an eighty-year-old patient admitted to Memorial Hospital on 14 February 2002, with a diagnosis of gangrene of the left foot. Mr. W was a seventy-five-year-old patient who was admitted through Memorial Hospital's emergency room on 16 March 2002, with shortness of breath and low blood pressure. Both patients later died while being treated at Memorial Hospital.

At a meeting of Memorial Hospital's Medical Executive Committee (Executive Committee) on 22 April 2002, Arnold Nunnery, Chief Executive Officer (CEO) of Memorial Hospital, presented handwritten complaints by Nurse Traci Jenkins and Nurse Gail Roberts regarding Dr. Lohrmann's care of Ms. S and Mr. W. Nurse Jenkins, who was also the granddaughter of Ms. S, reported that Dr. Lohrmann made arrangements for a surgical consultation to amputate Ms. S's leg, despite Ms. S's living will and despite discussion with family members that Ms. S's leg should not be amputated. Nurse Jenkins also reported that Dr. Lohrmann was unwilling to speak with Ms. S and confirm Ms. S's consent to the amputation in the presence of Nurse Jenkins.

Nurse Roberts reported concerns about Dr. Lohrmann's changes to Mr. W's code status, the set of instructions for medical personnel should Mr. W. experience cardiac arrest or respiratory failure. Nurse Roberts reported that Dr. Lohrmann changed Mr. W's code status twice without discussing the changes with Mr. W's primary physician and that Dr. Lohrmann's instructions were too confusing for the nurses to follow.

After reviewing the written complaints of Nurse Jenkins and Nurse Roberts, the Executive Committee authorized a review of both cases by an outside physician. The two cases were reviewed by Dr. Ronald Falk (Dr. Falk), Chief of the Division of Nephrology & Hypertension at the UNC School of Medicine. Dr. Falk submitted his report to the CEO of Memorial Hospital in a letter dated 5 July 2002. The Executive Committee reviewed Dr. Falk's report on 26 August

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2002 and, in accordance with the medical staff bylaws, decided that the Chair of the Department of Medicine at Memorial Hospital would discuss voluntary suspension with Dr. Lohrmann. Dr. Lohrmann refused the Chair's suggested thirty-one-day suspension. Thereafter, in accordance with the medical staff bylaws, a departmental ad hoc investigating committee (the investigating committee) was appointed to consider the accusations against Dr. Lohrmann. Memorial Hospital's CEO informed Dr. Lohrmann of the appointment of the investigating committee in a letter dated 28 August 2002.

The CEO and Byron E. Dunaway, M.D., president of the medical staff of Memorial Hospital, provided Dr. Lohrmann with a statement of the charges against Dr. Lohrmann in a letter dated 18 September 2002. The letter stated that the Executive Committee had reviewed Dr. Falk's report and had concluded that Dr. Lohrmann's performance in treating Ms. S and Mr. W was "lower than the standards of [Memorial Hospital's] Medical Staff[.]" The letter detailed the following specific conduct that the Executive Committee stated failed to meet medical staff standards: (1) violation of Ms. S's rights "by not honoring [her] wishes as discussed in her Living Will and as per her family's wishes"; and (2) violation of Mr. W's rights "in relation to whether or not he should be resuscitated as provided by physician's order . . . [which] was written on the basis of prior discussion with [Mr. W] and [his] family."

The investigating committee interviewed a number of individuals, including Dr. Lohrmann, between 20 and 23 September 2002. The written summary of the investigating committee indicated the issues concerning Dr. Lohrmann were patient rights, as well as "communication with the patient/family/nursing/consulting physician attending." The investigating committee made the following pertinent findings: (1) there was poor communication and handling of disagreements with family members; and (2) it was not clear from the record that Mr. W's code status had been discussed with the attending physician prior to the change made by Dr. Lohrmann.

The Executive Committee met on 23 September 2002 to review the investigating committee's summary. Pursuant to medical staff bylaws, Dr. Lohrmann and his attorney were present for the meeting of the Executive Committee and were permitted to make statements and answer questions. After the Executive Committee met with Dr. Lohrmann and considered the investigating committee's summary, the Executive Committee voted to suspend Dr. Lohrmann

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for seven days and to require him to complete a patient-oriented medical ethics course.

Pursuant to Article VII, Section 2 of the medical staff bylaws, the CEO notified Dr. Lohrmann of the Executive Committee's recommendation in a letter dated 24 September 2002. The letter stated:

The reason for the adverse recommendation by [the Executive Committee] is that your actions taken in managing the professional services for the patients [Ms. S and Mr. W] were below the acceptable standards for members of the Medical Staff. Your determination that [Ms. S] was capable of consenting for the amputation of a limb was inconsistent with her medical condition and her Living Will; also it required close coordination with involved family members and physicians, which did not effectively occur. Your alteration of the DNR status of [Mr. W] without first obtaining the concurrence of the primary physician was inappropriate, and you entered an inappropriate order to effect the change.

Pursuant to Article VI, Section 1(f) of the medical staff bylaws, the Executive Committee's recommendation for suspension entitled Dr. Lohrmann to exercise procedural rights to a hearing before a panel of medical staff members appointed by the president of the medical staff. Dr. Lohrmann made a timely request for a hearing before a panel (the panel) which was granted. At the panel's hearing on 13 and 14 January 2003, Dr. Lohrmann was present and represented by counsel who called, examined, and cross-examined witnesses. The panel prepared a written report dated 18 February 2003 in which it concluded that a corrective action by the Executive Committee was an appropriate response to Dr. Lohrmann's conduct, but recommended alternatives to suspension. In its report, the panel also noted that it "[took] exception to [the Executive Committee's] conclusion that patients' rights were violated. Nonetheless, principles of medical ethics [were] brought into question by Dr. L[ohrmann]'s conduct." The Executive Committee convened on 24 February 2003 to consider the findings of the panel. The Executive Committee reinstated the recommendation for a seven-day suspension and also imposed the alternatives to suspension recommended by the panel. The Executive Committee further decided that if Dr. Lohrmann failed to complete the alternatives, then he would be suspended for a total of thirty-one days.

Pursuant to the medical staff bylaws, Dr. Lohrmann appealed the Executive Committee's recommendation to the governing body

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of Memorial Hospital. The governing body heard Dr. Lohrmann's appeal and affirmed the recommendation of the Executive Committee on 3 April 2003.

Dr. Lohrmann filed a verified complaint and motion for a temporary restraining order and preliminary injunction on 4 April 2003. Judge Christopher M. Collier (Judge Collier) granted Dr. Lohrmann's motion for a temporary restraining order (TRO) and prohibited Memorial Hospital from revoking, suspending, curtailing or placing any other restriction on Dr. Lohrmann's medical staff privileges until the hearing on the motion for preliminary injunction. The TRO also prohibited Memorial Hospital from reporting its corrective action to the North Carolina Medical Board (the Medical Board) until: (1) the entry of an order dismissing the TRO or denying a preliminary injunction; or (2) the determination of the case on its merits, whichever occurred first. By order dated 24 April 2003, Judge Larry G. Ford (Judge Ford) allowed Dr. Lohrmann's motion for preliminary injunction and enjoined Memorial Hospital from suspending Dr. Lohrmann's medical staff privileges and from reporting its action to the Medical Board. Dr. Lohrmann filed a verified first amended complaint on 25 April 2003. Dr. Lohrmann filed and served a motion for summary judgment on 18 March 2004 seeking to obtain permanent injunctive relief. Memorial Hospital filed and served its own motion for summary judgment on 20 May 2004.

Judge Mark E. Klass (Judge Klass) denied Dr. Lohrmann's motion for summary judgment and entered summary judgment in favor of Memorial Hospital on 21 June 2004. Judge Klass ordered that the preliminary injunction entered by Judge Ford be dissolved, but stayed dissolution until 1 July 2004 to allow Dr. Lohrmann time to appeal to this Court. We entered an order on 1 July 2004 staying Judge Klass's order pending our ruling on Dr. Lohrmann's petition for writ of superseedeas. This Court then granted Dr. Lohrmann's petition on 13 July 2004 and stayed Judge Klass's order pending the outcome of the appeal.

Dr. Lohrmann argues four grounds on which the trial court erred in granting summary judgment for Memorial Hospital: (I) Memorial Hospital's bylaws constituted a contract between Dr. Lohrmann and Memorial Hospital; (II) there were genuine issues of material fact as to whether Memorial Hospital breached its bylaws; (III) findings of fact in the preliminary injunction were supported by the record and gave rise to genuine issues of material fact; and (IV) Memorial

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Hospital's efforts to suspend Dr. Lohrmann were in violation of N.C. Gen. Stat. § 131E-85.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The burden is on the moving party to establish the lack of a triable issue of fact. *McKeel v. Armstrong*, 96 N.C. App. 401, 406, 386 S.E.2d 60, 63 (1989). To meet its burden, the movant is required to present a forecast of the evidence available at trial that shows there is no material issue of fact concerning an essential element of the non-movant's claim and that the element could not be proved by the non-movant through the presentation of further evidence. *Id.* Once the movant has supported its motion for summary judgment, the burden shifts to the other party "to introduce evidence in opposition to the motion setting forth 'specific facts showing that there is a genuine issue for trial.'" *Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 31, 258 S.E.2d 77, 80 (1979). Appellate review of entry of summary judgment requires a two-part analysis of whether, "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Charlotte Eastland Mall, LLC v. Sole Survivor, Inc.*, 166 N.C. App. 659, 661, 608 S.E.2d 70, 72 (2004) (citations and internal quotation marks omitted).

I.

[1] Dr. Lohrmann argues that the trial court erred in granting summary judgment to Memorial Hospital because Memorial Hospital's bylaws constituted a contract between Memorial Hospital and Dr. Lohrmann. Dr. Lohrmann cites our Court's decision in *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 488 S.E.2d 284, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38-39 (1997), in which we held that if a hospital's offer to extend staff privileges to a physician includes a condition that the physician adhere to certain bylaws and the physician accepts the hospital's offer, then those bylaws become part of the contract between the hospital and the physician. *Virmani*, 127 N.C. App. at 76-77, 488 S.E.2d at 288. We adhere to the principle of law articulated in *Virmani* that a claim for breach of contract may arise from an employer's failure to adhere to its bylaws. We find no genuine issue of material fact as to whether Memorial

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Hospital's bylaws constitute a contract between Memorial Hospital and Dr. Lohrmann, and Memorial Hospital does not dispute that such a contract exists.

II.

[2] Dr. Lohrmann argues that the trial court erred in finding no genuine issue of material fact as to whether Memorial Hospital breached its bylaws in suspending Dr. Lohrmann's medical privileges. For the reasons discussed below, we disagree.

On the issue of breach, Dr. Lohrmann first argues that Memorial Hospital failed to comply with Article VI, Section 1(a) of its medical staff bylaws regarding commencement of corrective action:

(a) . . . [C]orrective action against [a] physician or dentist may be requested by any officer of the Medical Staff, by the Chief Executive Officer, or by the Governing Body. All requests for corrective action shall be in writing, shall be made to the Executive Committee and shall be supported by reference to the specific activities or conduct which constitute the grounds for the request.

Specifically, Dr. Lohrmann argues that (1) corrective action was not requested by an officer of the medical staff, the CEO, or the governing body; (2) the request for corrective action was not in writing; (3) the request for corrective action was not directed to the Executive Committee; and (4) the request for corrective action was not supported by reference to the specific activities or conduct which constituted the grounds for the request.

Dr. Lohrmann argues that the handwritten notes of Nurse Jenkins and Nurse Roberts do not suffice as written requests for corrective action with the degree of specificity required by the medical staff bylaws. Moreover, Dr. Lohrmann contends that neither Nurse Jenkins nor Nurse Roberts falls within the category of individuals who may request corrective action. However, it appears from the record that the CEO was the person who requested that corrective action be taken against Dr. Lohrmann. The CEO, with the written complaints from Nurse Jenkins and Nurse Roberts in hand, addressed the Executive Committee with his concerns on 22 April 2002. These written complaints referred to the specific activities or conduct which constituted the grounds for the request. Under these facts, Memorial Hospital substantially complied with its bylaw procedures for requesting corrective action when its CEO directed a request for cor-

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rective action to the Executive Committee. The CEO's request, though not in writing, was supported by the written complaints of Nurse Jenkins and Nurse Roberts that referred to the specific activities or conduct which constituted the grounds for the request.

[3] Dr. Lohrmann next argues that Memorial Hospital failed to comply with its corporate bylaw provision that requires an affected medical staff practitioner to be heard at each step of the disciplinary process. The corporate bylaw Dr. Lohrmann cites is Article VII, Section 3, which provides: "The Medical Staff Bylaws shall include: (a) A mechanism for review of adverse Medical Staff decisions, including the right of the affected practitioner to be heard at each step of the process when requested by the affected practitioner[.]" Dr. Lohrmann argues that Memorial Hospital breached this bylaw provision by failing to provide Dr. Lohrmann with copies of the nurses' complaints and by failing to give Dr. Lohrmann notice of the 22 April 2002 Executive Committee meeting at which the complaints were considered. Dr. Lohrmann asserts that he was unaware that his care of Ms. S and Mr. W was the subject of the 22 April 2002 meeting, and therefore he had no opportunity to be heard at each step of the process.

The corporate bylaw provision that Dr. Lohrmann cites, however, does not apply to the process of investigating physician conduct. Rather, upon careful reading, the "process" to which the corporate bylaw provision refers is the process of formal hearing and appellate review subsequent to an adverse Executive Committee recommendation. The Executive Committee made no adverse recommendation until after the 22 April 2002 meeting. Therefore, any right to be heard guaranteed by the corporate bylaw that Dr. Lohrmann cites did not apply prior to that meeting.

Pursuant to the corporate bylaw cited, Memorial Hospital's medical staff bylaws provide that after an adverse medical staff recommendation, the medical staff practitioner is entitled to certain procedural rights. The practitioner is entitled to: prompt written notice stating the reasons for an adverse recommendation by the Executive Committee; a hearing before a medical staff panel appointed by the president of the medical staff; a notice of hearing which shall again state the reasons for the adverse recommendation; the right to be accompanied and/or represented by counsel at the hearing; the right to submit memoranda concerning any issue of procedure or of fact; and the right to call and examine witnesses, to introduce written evidence, to cross-examine witnesses, to challenge witnesses, and to rebut any evidence. All of the foregoing procedures were complied

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with in Dr. Lohrmann's case. He received written notice of the Executive Committee's recommendation in a letter from the CEO dated 24 September 2002, the day after the Executive Committee meeting. This letter detailed the reasons for the Executive Committee's recommendation. Dr. Lohrmann made a timely request for a hearing before the panel. At the panel hearing on 13 and 14 January 2003, Dr. Lohrmann was present and represented by counsel who called, examined and cross-examined witnesses.

Dr. Lohrmann also argues that a hearing by a panel, even if procedurally correct, does not cure Memorial Hospital's breach of bylaws in the prior investigatory process. Again, he cites *Virmani*. The facts of *Virmani*, however, are distinguishable from those of the present case. In *Virmani*, the physician was not allowed to participate at all in the investigatory peer review process, in violation of the hospital's bylaws which specified that a physician under investigation be provided an opportunity to respond to written queries from the investigatory peer review committee. *Virmani*, 127 N.C. App. at 71, 488 S.E.2d at 286. Because the hospital omitted a required step in its process, our Court in *Virmani* found that the physician was entitled to a new peer review investigation to be conducted in accordance with the hospital's bylaws. *Id.* at 78-79, 488 S.E.2d at 289. In the case before us, none of the investigatory steps provided by Memorial Hospital's medical staff bylaws were omitted. As discussed above, Memorial Hospital substantially complied with its medical staff bylaws concerning the request for corrective action. The process then continued in accordance with further bylaw provisions. Pursuant to Article VI, sections 1(b) and (c) of the medical staff bylaws, the investigating committee was formed when it became evident that the corrective action could be the suspension of Dr. Lohrmann's privileges, and Dr. Lohrmann was present for an interview with the investigating committee. In accordance with Article VI, Section 1(d), Dr. Lohrmann appeared before the Executive Committee prior to its taking action on the request and the investigating committee report. Unlike *Virmani*, there is no investigatory procedure left undone that could alter the outcome of another peer review upon remand in this case.

[4] On the issue of breach of contract, Dr. Lohrmann next argues that he was unable to fully and adequately defend himself at the January 2003 hearing because Memorial Hospital failed to inform him of all the charges he faced. Specifically, Dr. Lohrmann argues that he did not receive notice of any concern that his conduct caused "disruption," a term that first appeared in the panel's report of 18 February

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2003. Dr. Lohrmann contends that in not specifying that he was charged with being disruptive, Memorial Hospital breached its bylaw provision requiring notice of specific activities or conduct that constitute the basis for a suspension. Dr. Lohrmann argues that in preparing his defense for the January 2003 hearing, he relied solely on the 18 September 2002 letter from the CEO, and prepared to defend charges of violating patient rights, specifically issues of medical ethics, advanced directives, and the right to die.

Although the letter of 18 September 2002 used the phrase "patients' rights," the letter also discussed issues of communication with family and physicians. Moreover, the 24 September 2002 letter from the CEO further particularized the issues pertaining to Dr. Lohrmann's conduct. The 24 September 2002 letter served as Dr. Lohrmann's notice of the Executive Committee's adverse recommendation of the previous day. This letter described in detail both the Executive Committee's reasons for voting to suspend Dr. Lohrmann's medical privileges and the charges that would be considered at the hearing, namely: (1) Dr. Lohrmann's failure to effectively coordinate with involved family members and physicians about the care of Ms. S, (2) Dr. Lohrmann's failure to obtain the concurrence of Mr. W's primary physician before changing the code status, and (3) Dr. Lohrmann's failure to enter an appropriate order to effect the change.

The panel, while noting that it "[took] exception to the Executive Committee's conclusion that patients' rights were violated," nevertheless concluded that "principles of medical ethics ha[d] been brought into question by Dr. L[ohrmann]'s conduct." The panel found that Dr. Lohrmann had a "disturbing disregard for the validity of patients' wishes as expressed through advanced directives, family contribution and input from other health care workers." Further, Dr. Lohrmann was "unwilling or unable to work with other health care personnel" which led to "confusion and disruption of standard medical care." It was "in regards to this disruption" that the panel focused its concerns.

Whether Dr. Lohrmann's conduct was labeled as a "disruption," "failure to effectively coordinate," "disturbing disregard for the validity of patients' wishes" or any of the other terms used by Dr. Falk, the investigating committee, the Executive Committee, or the panel, the issues concerning Dr. Lohrmann's manner of care of Ms. S and Mr. W were the same throughout the corrective action proceedings. As early as 26 August 2002, Dr. Lohrmann received notice that the investigating committee would be reviewing his con-

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duct in caring for Ms. S and Mr. W. At Dr. Lohrmann's meeting with the investigating committee on 20 September 2002, Dr. Lohrmann was questioned about communication with family members and physicians, as well as his entry of a code order that might confuse nurses and physicians. While the CEO's letter of 18 September 2002 used the phrase "patients' rights," it also discussed issues of communication with family and physicians. At the very latest, the CEO's detailed letter of 24 September 2002 gave sufficient notice to afford Dr. Lohrmann an adequate opportunity to prepare a defense for the hearing scheduled for January 2003. We find that Dr. Lohrmann had sufficient notice of the charges against him to be able to present facts and defend his conduct at the January 2003 hearing.

III.

[5] Dr. Lohrmann argues that the trial court erred in granting summary judgment for Memorial Hospital because the findings of fact set forth in the preliminary injunction dated 24 April 2003 gave rise to genuine issues of material fact. Dr. Lohrmann acknowledges that the findings in the preliminary injunction proceeding would not be binding at a subsequent trial on the merits, but he argues that they would support a judgment for plaintiff if uncontradicted. We find this argument to be without merit.

It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits. *Huggins v. Wake County Board of Education*, 272 N.C. 33, 40-41, 157 S.E.2d 703, 708 (1967). "Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing." *Huskins v. Yancey Hospital, Inc.*, 238 N.C. 357, 362, 78 S.E.2d 116, 121 (1953). The purpose of an interlocutory injunction is to preserve the status quo of the subject matter of the suit until a trial can be held. *Id.* at 360, 78 S.E.2d at 119. The burden of proof required to support a preliminary injunction is less than that required for a motion for summary judgment, and the evidence is less complete. *See Schultz & Assoc. v. Ingram*, 38 N.C. App. 422, 248 S.E.2d 345 (1978). Accordingly, the trial court did not err in determining there was no genuine issue of material fact.

IV.

[6] Dr. Lohrmann next argues that Memorial Hospital's corrective action against him was in violation of N.C. Gen. Stat. § 131E-85 (2003), which provides in part:

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- (a) The granting or denial of privileges to practice in hospitals to physicians . . . and the scope and delineation of such privileges shall be determined by the governing body of the hospital on a non-discriminatory basis. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities, in which privileges are sought.

. . . .

- (c) In addition to the granting or denial of privileges, the governing body of each hospital may suspend, revoke, or modify privileges.
- (d) All applicants or individuals who have privileges shall comply with all applicable medical staff bylaws, rules and regulations, including the policies and procedures governing the qualifications of applicants and the scope and delineation of privileges.

Dr. Lohrmann argues that Memorial Hospital had no grounds under N.C. Gen. Stat. § 131E-85 for suspending his privileges. He contends that Memorial Hospital sought to suspend his privileges solely on the basis of violating patients' rights, but that no such rights were violated. Dr. Lohrmann contends that he complied with the wishes of his patients and with North Carolina law regarding living wills and the right of a patient to control decisions relating to her or his medical care. Therefore, Dr. Lohrmann argues that Memorial Hospital's attempt to discipline him for following the law was in violation of stated North Carolina public policy, and as such violated N.C. Gen. Stat. § 131E-85.

Dr. Lohrmann bases this argument on the allegation that Memorial Hospital sought to suspend his privileges solely on the basis of violating patients' rights. As discussed above, other factors pertaining to Dr. Lohrmann's conduct were clearly at issue throughout the corrective action proceedings. Furthermore, N.C. Gen. Stat. § 131E-85 provides that a hospital may take into account the judgment and character of a physician, as well as the reasonable objectives and regulations of the hospital, in suspending a physician's privileges.

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[7] Alternatively, Dr. Lohrmann argues that Memorial Hospital's decision to suspend him was arbitrary and capricious, based on irrelevant consideration and not upon the reasonable objectives and regulations of Memorial Hospital. By statute, regulation, and case law, the authority to make corrective action decisions rests with the governing body of a hospital. See N.C. Gen. Stat. § 131E-85; 10A NCAC 13B .3701, .3702, .3705 (June 2004); *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901 (1982). It is not the role of this Court to substitute our judgment for that of the hospital governing body, which has the responsibility of providing a competent staff of physicians under N.C. Gen. Stat. § 131E-85. See *Claycomb v. HCA-Raleigh Community Hosp.*, 76 N.C. App. 382, 333 S.E.2d 333 (1985). As long as the governing body's suspension of privileges is "administered with fairness, geared by a rationale compatible with hospital responsibility and unencumbered with irrelevant considerations, [this] [C]ourt should not interfere." *Cameron*, 58 N.C. App. at 449, 293 S.E.2d at 922 (quoting *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971)). We find that Memorial Hospital's governing body met this standard.

First, our discussion of Memorial Hospital's compliance with its corporate and medical staff bylaws illustrates that the governing body's suspension of Dr. Lohrmann was administered with fairness. Next, the governing body's decision to suspend Dr. Lohrmann was geared by a rationale compatible with hospital responsibilities, namely to ensure full and adequate communication and cooperation with patients, families, physicians, and other medical personnel. Finally, Dr. Lohrmann makes no argument about irrelevant considerations.

We note that peer review proceedings such as Dr. Lohrmann's are conducted by committees of physicians and lay persons. As quasi-legal proceedings, such peer reviews are less formal than court proceedings and have been accorded a degree of deference by our Court. This Court has held that the evaluation of the performance of physicians "is best left to the specialized expertise of their peers, subject only to limited judicial surveillance." *Id.* To proceed otherwise would inhibit the vital role of the peer review process. Members of Dr. Lohrmann's peer committee and panel were specially situated to evaluate whether Dr. Lohrmann's conduct met the standard of care set by Memorial Hospital. The decision-making of the governing body relied on the findings of Dr. Lohrmann's peers and was fair and reasonable.

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In light of the evidence and discussion above, we hold that there is no genuine issue of material fact as to whether Memorial Hospital breached its contractual bylaws with Dr. Lohrmann, that the findings of fact from the preliminary injunction were not binding on the trial court, and that Memorial Hospital's decision under N.C. Gen. Stat. § 131E-85 was proper. The trial court did not err in granting summary judgment in favor of Memorial Hospital.

Affirmed.

Judges HUNTER and LEVINSON concur.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION
AGAINST DOUGLAS WEISS

BLAINE WEISS, PETITIONER V. NORTH CAROLINA COMMISSIONER OF BANKS &
NORTH CAROLINA BANKING COMMISSION, RESPONDENTS

No. COA04-1467

(Filed 18 October 2005)

**1. Banks and Banking— mortgage loan officer licensure—
grandfather provisions**

The Banking Commission did not err by refusing appellants' loan officer license applications under the grandfather provisions of the Mortgage Lending Act. A plain language reading of the statute indicates that the grandfather clause exempts practicing loan officers from the required training only, not from additional statutory requirements.

**2. Banks and Banking— mortgage loan officer licensure—
responsibility for subordinate employee**

There was no merit to the assertion that the Banking Commission erred by making applicants for licensure as mortgage loan officers responsible for the conduct of a subordinate employee. The Banking Commission's conclusions rely on findings supported by the record as to appellants' own actions and responses to consumer complaints.

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3. Banks and Banking— mortgage loan officer licensure— default judgment for unfair and deceptive practices—not conclusive

The Banking Commission did not treat as conclusive a default judgment for unfair and deceptive practices against a mortgage company owned by the applicants for mortgage loan officer licensure. The Commission's findings indicate that the default judgment was treated as evidence of a claim which, coupled with other testimony, demonstrated a pattern of business operations.

4. Banks and Banking— mortgage loan officer licensure— complaints—reliance on number, not validity

The Banking Commission did not err when denying licenses for mortgage loan officers in its findings about the number of consumer complaints against a company owned by appellants. Testimony from the ombudsman in the Office of the Commissioner of Banks was from personal knowledge as to the number and not the validity of the complaints, and the Commission's findings were only to that effect.

5. Banks and Banking— mortgage loan officer licensure—purpose—plain language of Act

The Banking Commission relied on the plain language of the Mortgage Lending Act in determining its purpose, and did not rely on opinion testimony.

6. Banks and Banking— mortgage loan officer licensure— findings—sufficiency of evidence

Evidence in the whole record supported the Banking Commission's findings in denying mortgage loan officer licensure.

7. Banks and Banking— mortgage loan officer licensure—failure to make certain findings

The Banking Commission did not err by failing to make findings appellants contended could have been made in a case concerning mortgage loan officer licensure. The Commission properly considered the evidence in the whole record in making its findings.

8. Banks and Banking— mortgage loan officer licensure— denial not arbitrary

The Banking Commission's decision to deny mortgage loan officer licensure was not arbitrary or capricious where the Com-

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mission made detailed findings and conclusions which rationally support the denial of appellants' applications.

**9. Banks and Banking— mortgage loan officer licensure—
general counsel as prosecutor—due process**

Appellants alleged no bias or prejudice from the participation of the general counsel of the Office of Commissioner of Banks as the prosecutor in the proceeding in which they were denied mortgage loan officer licensure. As they allege no actual harm, no per se violation of due process may be found.

Appeal by petitioners from orders entered 6 August 2004 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 May 2005.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for petitioner-appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General L. McNeil Chestnut and Assistant Attorney General Anne J. Brown, for respondent-appellee.

HUNTER, Judge.

Douglas Weiss ("Douglas") and Blaine Weiss ("Blaine") (collectively "appellants") appeal from orders affirming denials by the North Carolina State Banking Commission ("Banking Commission") of appellants' applications for licensure as mortgage loan officers entered 6 August 2004. As we find no error, we affirm the trial court's orders.

Appellants were the sole shareholders, directors, and officers of Superior Mortgage Company ("Superior"). Superior received numerous consumer complaints filed with the Office of the Commissioner of Banks ("OCOB"). Superior was found to have engaged in unfair and deceptive trade practices, and a default judgment was awarded against the company for failure to honor a refinancing agreement. In 2000, Superior surrendered its mortgage broker registration to the OCOB and filed for bankruptcy. Appellants then became employed as loan officers for a mortgage broker, United Home Mortgage ("United Home").

In 2001, legislation was enacted which required, for the first time, licensure by the OCOB of all mortgage brokers, bankers, and loan officers. This legislation, entitled the Mortgage Lending Act, became effective 1 July 2002.

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On 9 September 2002, appellants each filed applications with OCOB for licensure as mortgage loan officers. Because of their previous experience in the industry, both appellants filed under the grandfather provision of an uncodified portion of the Mortgage Lending Act, enacted as 2001 N.C. Sess. Laws ch. 393, § 5(b). The OCOB denied both appellants' applications on 6 February 2003.

Appellants appealed the denial and the matters were heard before the Commissioner of Banks ("Commissioner") in June and July 2003. A Final Decision and Order was entered by the Commissioner on 8 September 2003, affirming the preliminary denials of the mortgage loan officer licenses.

Appellants appealed the Commissioner's Orders to the Banking Commission on 25 September 2003. An Appellate Panel, after review of the appeals, recommended to the Full Banking Commission that the Orders be affirmed. On 21 January 2004, the Banking Commission upheld the Final Decision and Orders.

Appellants filed for review of the Orders in superior court. On 6 August 2004, the superior court affirmed the decisions of the Banking Commission. Appellants now appeal to this Court. We note that where appellants raise identical issues, we address those assignments of error together.

Before addressing the merits of appellants' claims, we first note the applicable standard of review. The proper manner of review of a final agency decision "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Our statutes provide that a reviewing trial court may

reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

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- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2003). *De novo* review is proper when the issue raised is whether an agency decision was based on an error of law. *Beneficial North Carolina v. State ex rel. Banking Comm.*, 126 N.C. App. 117, 122, 484 S.E.2d 808, 811 (1997). However, when the appellant challenges “(1) whether the agency’s decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the ‘whole record’ test.” *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). “The ‘whole record’ test ‘requires the reviewing court to examine all competent evidence (the “whole record”) in order to determine whether the agency decision is supported by “substantial evidence.” ’ ” *Beneficial*, 126 N.C. App. at 122, 484 S.E.2d at 811 (citation omitted).

“The standard of review for an appellate court when reviewing a superior court order affirming or reversing a decision of an administrative agency requires the appellate court to examine ‘the trial court’s order for error of law’ just as in any other civil case.” *Beneficial*, 126 N.C. App. at 123, 484 S.E.2d at 811 (quoting *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). “The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (citation omitted). However, our Supreme Court has recently affirmed that:

[I]n cases appealed from an administrative tribunal under the APA, it is well settled that the trial court’s erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner’s asserted grounds for challenging the agency’s final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b).

N.C. Dep’t of Env’t & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

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I.

[1] Appellants first contend the Banking Commission erred in not granting appellants' loan officer license applications under the grandfather provisions of the Mortgage Lending Act. As this assignment raises an error of law, we review the issue *de novo* and find no error.

Appellants' contention raises a question of first impression for this Court. We therefore carefully examine the statutes which govern such licensure. In interpreting our state statutes, "the primary function of this Court is to 'ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished.' To determine legislative intent, we examine the language and purpose of the statute." *Albemarle Mental Health Ctr. v. N.C. Dep't of Health & Human Servs.*, 159 N.C. App. 66, 68, 582 S.E.2d 651, 653 (2003) (citations omitted). " 'Statutory interpretation properly begins with an examination of the plain words of the statute.' 'If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.' " *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (citations omitted).

The Mortgage Lending Act, N.C. Gen. Stat. Ch. 53, Art. 19A (2003), requires a loan officer license for any individual who "engage[s] in the solicitation and acceptance of applications for mortgage loans[.]" N.C. Gen. Stat. § 53-243.02(b) (2003). Such a licence is only effective when the loan officer is employed by a licensed mortgage broker or mortgage banker. N.C. Gen. Stat. § 53-243.02(c).

Qualifications for licensure as a mortgage broker, mortgage banker, or loan officer are set out in section 53-243.05. The statute requires, among other information:

- (4) The qualifications and business history of the applicant and, if applicable, the business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, including: (i) a description of any injunction or administrative order by any state or federal authority to which the person is or has been subject; (ii) a conviction of a misdemeanor involving fraudulent dealings or moral turpitude or relating to any aspect of the residential mortgage lending business; (iii) any felony convictions.

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- (5) With respect to an application for licensing as a mortgage banker or broker, the applicant's financial condition, credit history, and business history; and with respect to the application for licensing as a loan officer, the applicant's credit history and business history.
- (6) The applicant's consent to a criminal history record check and a set of the applicant's fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check may constitute grounds for the Commissioner to deny licensure to the applicant.

N.C. Gen. Stat. § 53-243.05(a)(4-6) (2003). The statute then specifically requires that loan officer applicants be at least eighteen years of age and have "satisfactorily completed, within the three years immediately preceding the date application is made, a mortgage lending fundamentals course approved by the Commissioner." N.C. Gen. Stat. § 53-243.05(b)(1-2).

However, 2001 N.C. Sess. Laws ch. 393 includes a grandfather provision governing individuals already employed in the mortgage lending business. 2001 N.C. Sess. Laws ch. 393, § 5(b) states:

(b) Any qualified person who files, within 90 days after this act becomes effective, a sworn application with the Commissioner stating that he or she has met the definition of a qualified person under G.S. 53-243.01(18), enacted by Section 2 of this act, including a statement that he or she has not been convicted of any felony or any misdemeanor involving moral turpitude, shall be issued a license as a loan officer from the Commissioner without having to meet the training requirements for licensure under G.S. 53-243.05(b), enacted by Section 2 of this act.

Id. "Qualified person" is defined in N.C. Gen. Stat. § 53-243.01(18) (2003) as:

A person who is employed as a loan officer by a qualified lender, or by a mortgage banker or broker registered with the Commissioner under former Article 19 of this Chapter, or who is a general partner, manager, or officer of a qualified lender, registered mortgage banker, or registered mortgage broker.

Id.

Appellants here contend that, as they were employed as loan officers, met the definition of qualified person, and filed within the

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required ninety days, the OCOB was required to issue them a loan officer license under 2001 N.C. Sess. Laws ch. 393, § 5(b). However, a plain language reading of 2001 N.C. Sess. Laws ch. 393, § 5(b) indicates that the grandfather clause exempts practicing loan officers only from the required training, not from the additional statutory requirements. The grandfather clause specifically states that such an applicant “shall be issued a license . . . without having to meet the *training requirements for licensure under G.S. 53-243.05(b)*[.]” *Id.* (emphasis added). Applicants are not relieved of the requirements of the remainder of § 53-243.05 discussed *supra*. Further, section 53-243.05(i) specifically states that:

(i) If the Commissioner determines that an applicant meets the qualifications for licensure and finds that the financial responsibility, character, and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business will be operated honestly and fairly, the Commissioner shall issue a license to the applicant.

N.C. Gen. Stat. § 53-243.05(i). Therefore, when read as a whole, the plain language of the statute indicates that the grandfather clause provision was intended to exempt practicing loan officers only from the three-year training requirement at the time of licensure, not to automatically grant licenses to all current loan officers, including those whose qualifications would not “warrant belief that the business will be operated honestly and fairly[.]” *Id.* We affirm the trial court’s conclusion that the statute does not exempt appellants from the statutory requirements other than training, and that the Banking Commission therefore did not err in applying the governing statute.

II.

[2] Appellants next contend the Banking Commission erred in making appellants, as corporate officers, personally responsible for conduct of a subordinate employee. We disagree.

Appellants specifically refer to findings made regarding transactions conducted by one of Superior’s employees, Michael D. Edwards (“Edwards”), which resulted in a judgment against Superior. The Banking Commission found as to Blaine that:

12. Superior engaged in business dealings with Peter Pike and his wife Heather, including false and misleading representations by Edwards on behalf of Superior, that were found by the Superior Court of Alamance County to be unfair and decep-

tive trade practices, resulting in an award of treble damages against Superior.

13. Although Appellant testified that he would have terminated Edwards for his conduct towards the Pikes[], there is no evidence that he took any such action. Further, there is no evidence that Appellant took any steps to address the Pikes' complaint or to supervise Edwards' conduct in any meaningful way prior to the time of such complaint.

...

16. Superior had no code of ethics or conduct and does not appear to have had any system of oversight or controls to ensure compliance with law and fair treatment of customers. There is no evidence that Superior took any steps to correct its obvious deficiencies with regards to the payment of appraisers or closing shortages.

The Banking Commission made similar findings as to Douglas and concluded, in part based on the findings set out above, that appellants failed to meet the statutory standard required for licensure, that is "that the financial responsibility, character, and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business will be operated honestly and fairly." Specifically, the Banking Commission concluded as to both applicants that:

Appellant's actions and omissions as [officer], shareholder and *de facto* general partner in Superior show a reckless disregard for the fair treatment of customers and compliance with applicable law and ethical business practices. Appellant's management of Superior and his testimony in this matter do not show an appreciation for the needs of customers or the demands of the law. On the basis of the record, Appellant does not have the character, competence or financial responsibility to conduct business as a loan officer or any other position in the mortgage lending industry.

Appellants' contention that the Banking Commission held appellants liable for the actions of a corporate agent when they did not directly participate in the wrongdoing themselves is not supported by the record. The Banking Commission's denials of licensure clearly state that the basis for its conclusions that appellants lacked "character [and] competence" were based on appellants' own failure to

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address consumer complaints and ensure fair and ethical treatment of consumers, and further that appellants lacked “financial responsibility” based on appellants’ own actions in failing to show financial responsibility by not correcting deficiencies in payments to appraisers. Thus as the Banking Commission’s conclusions rely on findings supported by the record as to appellants’ own actions and responses to consumer complaints against the business of which they were the sole shareholders, directors, and officers, we find appellants’ second assignment of error without merit.

III.

[3] Appellants next contend the Banking Commission erred in treating as conclusive a default judgment against Superior where unfair and deceptive practices were found. We disagree.

The Commission found, as set out *supra* in Findings 12 and 13, that Superior had engaged in false and misleading representation to Peter and Heather Pike, and that the Superior Court of Alamance County found these representations to be unfair and deceptive trade practices. Appellants contend that the Commission improperly found unfair trade practices had been committed by relying on the trial court’s findings in the default judgment.

After a careful review of the Commission’s order, we find no evidence that the Commission relied on the default judgment to conclusively establish unfair and deceptive trade practices. Rather, the record shows that independent evidence was offered by Peter Pike as to the unfair representations made by Superior regarding the mortgage transaction, and to the entry of a default judgment by the trial court after appellants failed to respond to the action. Testimony by Douglas also supports the Banking Commission’s finding regarding the judgment. In his testimony before the Banking Commission, Douglas stated that the Pike transaction had been improperly handled, and that as an officer of the company he took responsibility for that error. The Commission’s findings reflect this independent evidence, stating:

13. . . . Appellant did not present any evidence that the Pike claim was not justified or that the conduct of Superior personnel was ethical or appropriate in the circumstances. The Pike claim was the result of Superior’s method of business operations for which Appellant was jointly responsible, and that claim was the probable consequence of such business operations.

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Therefore, the findings indicate that the Commission did not treat the default judgment as factually binding, but rather as evidence of a claim which, coupled with the testimony of Pike and Douglas, demonstrated a pattern of business operations regarding false and misleading representations. The Commission, therefore, did not improperly rely on the default judgment.

IV.

[4] Appellants next contend the Banking Commission erred in finding validity in consumer complaints against Superior by reason of their large number. We disagree.

With regards to consumer complaints, the Banking Commission found:

9. Superior was the subject of numerous consumer and appraiser complaints, characterized by witness George King of OCOB as, "Exceedingly high." . . . The twenty-nine complaints presented in this matter included non-payment of appraisers, misleading solicitation of business, and the allegations of the Pikes and Mussons referred to below.

10. Appellant did not deny the existence of the complaints against Superior[.]

Appellants correctly contend that under the North Carolina Rules of Evidence, lay witness testimony is limited to opinions rationally based on the perception of the witness. N.C. Gen. Stat. § 8C-1, Rule 701 (2003). Here, George King ("King") testified that during the period he was ombudsman for OCOB, twenty-nine complaints over a period of three and a half years were received regarding Superior's services, and that such a number was exceedingly high in comparison with other mortgage brokers. As King testified from personal knowledge as to the number, and not as to the validity of complaints received, and the Banking Commission made findings only to that effect, we find appellants' assignment of error is without merit.

V.

[5] Appellants next contend the Banking Commission erred in making findings on the basis of opinion evidence as to the purpose of legislation. We disagree.

The Banking Commission found:

22. On the basis of his involvement with Superior, George King of OCOB offered the opinion that the business practices of

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Superior were the kind of practices that resulted in the enactment of the Mortgage Lending Act, as was an intention by the General Assembly to keep people like Appellant and his brother out of the mortgage lending business.

Appellant contends the Banking Commission erred in making such a finding as “[t]estimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.” *Milk Commission v. Food Stores*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967).

Here, however, the Banking Commission’s conclusions as to the purposes of the Mortgage Lending Act are based on the language of the statute, rather than on King’s opinion. The Banking Commission concluded:

6. It is important to note that the Mortgage Lending Act was enacted to address numerous fraudulent and unethical practices in the mortgage lending industry, including the making of false or misleading statements, failure properly to apply loan proceeds, and failure promptly to pay appraisers. N.C. Gen. Stat. § 53-243.11. The record in this matter is replete with examples of the kind of conduct the Mortgage Lending Act is intended to prevent.

As the Banking Commission did not rely on the opinion testimony of King, but rather on the plain language of the statute itself in determining the purpose of the Mortgage Lending Act, we find the Banking Commission did not err in its findings of King’s opinion.

VI.

[6] Appellants next contend the Banking Commission erred in making findings of fact not based on competent, material, and substantial evidence. We disagree.

As noted above, a challenge as to whether an agency’s decision was supported by the evidence requires review of all competent evidence, i.e. the “whole record,” in order to determine whether the agency decision is supported by substantial evidence. *Beneficial*, 126 N.C. App. at 122, 484 S.E.2d at 811.

A careful review of the whole record in this case reveals that substantial evidence supported the challenged findings. Blaine first chal-

lenges Finding of Fact 12 for the reasons stated *supra* in Section II of this opinion. As discussed in that section, sufficient evidence was presented to support the Banking Commission's finding.

Blaine next challenges Finding of Fact 13, set out *supra*. A review of the record reveals no evidence was presented that appellant took any action towards Edwards for his improper actions in the Pike transaction. The Banking Commission's finding is therefore supported.

Blaine finally challenges Finding of Fact 18: "Appellant did not introduce evidence that such advances approximated what he had taken out of the firm while it was in operation." Appellant contends there was no basis for requiring such advances to be equal. However, ample evidence was presented that both appellants used company resources to purchase personal items unrelated to the business in excess of \$100,000.00, and that unsatisfied debts remained after Superior filed for bankruptcy. Therefore substantial evidence supported the finding.

Douglas first challenges Finding of Fact 11, that "[a]ppellant knew, or in the exercise of reasonable care should have known, of Superior's non-payment of appraisers and pay-off shortages and did nothing to deal with either matter." Appellant's own testimony established that he was the Vice-President, Secretary, and Treasurer of Superior, and ample evidence was presented that appraisers were not paid and pay-off shortages were unremedied for varying lengths of time by Superior. As there is sufficient evidence in the record, the Banking Commission did not err in this finding.

Douglas next challenges Finding of Fact 14, regarding the Mussons' transaction. Finding of Fact 14 states in part:

(i) the Mussons' were solicited by means of a mailer that was at best misleading; (ii) representations were made to the Mussons' regarding the structure of the proposed refinancing that were false and misleading; (iii) the HUD closing statements prepared in respect of the refinancing were materially incorrect; (iv) there was a material shortage with regard to one of the two loans to be refinanced that resulted in the Mussons' being obligated for three loans and (v) even if competently completed, the transaction did not result in any material new benefit to the Mussons.

Evidence in the record supports all of the Banking Commission's findings as to the Musson transaction, and further, Douglas himself testi-

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fied before the Banking Commission that the loan was mishandled. Therefore the Banking Commission did not err in this finding.

Finally, Douglas contends that the Banking Commission erred in Finding of Fact 22 regarding his testimony as to his wife's occupation, which the Banking Commission found showed "a wanton indifference to the truthfulness of sworn testimony." A review of Douglas's testimony in this matter supports the finding. Douglas stated under oath that his wife was not employed outside the home and had no special skills, then retracted his testimony when confronted with evidence that his wife was a licensed mortgage loan officer employed by United Home. The Banking Commission therefore did not err in this finding.

As a review of the whole record reveals substantial evidence supporting the findings, we find no merit to appellants' assignment of error.

VII.

[7] Appellants next contend the Banking Commission erred in failing to make findings of fact required by the evidence. Appellants argue that additional findings could have been made from evidence presented to the Banking Commission. We disagree.

Our Supreme Court has previously addressed the issue of the role of the administrative agency in making findings of fact.

North Carolina is in accord with the well-established rule that it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness.

Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980) (citations omitted). Here, a review of the evidence and findings of fact demonstrates that the Banking Commission properly considered the evidence in the whole record in making the findings of fact. Appellants' contention is therefore without merit.

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VIII.

[8] Appellants next contend the Banking Commission erred in acting arbitrarily and capriciously in denying appellants' license applications. We disagree.

"An arbitrary or capricious decision is one 'without any rational basis in the record.' " *Beneficial*, 126 N.C. App. at 128, 484 S.E.2d at 814-15 (citation omitted). Here, the Banking Commission made detailed findings of fact and conclusions of law as to both appellants which rationally support the denial of appellants' applications. The Banking Commission specifically considered appellants' past actions in the mortgage lending industry in arriving at its conclusion that appellants failed to meet the statutory requirements for licensure. Further, as discussed *supra*, substantial evidence supported the Banking Commission's findings. Therefore, we find the Banking Commission's decision has a rational basis in the record and was not arbitrary or capricious.

IX.

[9] Douglas finally contends the Banking Commission erred in denying his motion for rehearing and appointment of independent counsel. Douglas argues that as the prosecutor in this proceeding, L. McNeil Chestnut ("Chestnut"), a Special Deputy Attorney General, is also general counsel to the OCOB, an impermissible appearance of impartiality was created. We disagree.

In *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 468 S.E.2d 557 (1996), this Court held that:

Under G.S. § 114-2(2), it is the duty of this State's Attorney General "[t]o represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." . . . In similar circumstances, we have held that no *per se* violation of due process arises from such a combination of advisory function and advocacy function in the absence of a showing of actual bias or unfair prejudice.

Id. at 66-67, 468 S.E.2d at 562.

Here, appellants do not contend that they suffered actual bias or prejudice as a result of Chestnut's involvement as prosecutor, merely alleging that the appearance created the harm of an unbiased deci-

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sion maker. As appellants allege no actual harm, no *per se* violation of due process may be found.

After a careful review of the record, we find no error of law and affirm the trial court's order affirming the Final Agency Decision of the Banking Commission.

Affirmed.

Judges HUDSON and GEER concur.

HARVEY C. TAYLOR, JR., PLAINTIFF V. DON A. ABERNETHY, INDIVIDUALLY AND JACK C. WEIR, ADMINISTRATOR CTA OF THE ESTATE OF ROMER GRAY TAYLOR, DEFENDANTS

No. COA04-651

(Filed 18 October 2005)

1. Evidence— dead man's statute—direct interest in property—inchoate dower rights

The wife of the plaintiff disputing an estate had a direct legal interest in the property through inchoate dower rights and was disqualified by the dead man's statute, N.C.G.S. § 8C-1, Rule 601, from testifying about oral communications between herself and the decedent or overheard conversations between her husband and decedent.

2. Evidence— hearsay—decedent's letters and envelopes—handwriting sample—corroboration of intent to make will

In an action on a contract to make a will, letters and envelopes from the decedent were admissible to corroborate the decedent's intent, as a handwriting sample, and to rebut defendant's assertion that the decedent would never have signed anything like the contract.

3. Evidence— handwriting expert—opinion admissible

A handwriting expert was properly allowed to give his opinion about the genuineness of decedent's signature on a contract to make a will.

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4. Evidence— dead man’s statute—party to action—interest in outcome

The trial court properly prohibited defendant from testifying about conversations he had with the decedent in an action involving a contract to make a will. Testimony is prohibited from witnesses who are parties to the action or who have a direct pecuniary interest in the event. N.C.G.S. § 8C-1, Rule 601.

5. Appeal and Error— law of the case—prior appeal—issues not necessary or decided

Defendant’s failure to cross-appeal issues in a first appeal did not preclude him from raising them in the second appeal because they were not actually decided on the first appeal, nor were they necessary for that decision.

6. Jurisdiction— choice of law—procedural issues—North Carolina law

Although a choice of law provision in a contract to make a will specified Pennsylvania law, North Carolina law governs all matters procedural when a lawsuit is filed in North Carolina regarding the validity of a contract made in another state. The trial court did not err by instructing the jury that the burden of proof was by the greater weight of the evidence.

7. Contracts— to make a will—elements—execution

The trial court erred by refusing defendant’s request for an instruction on whether plaintiff had established the elements of a contract in an action on a contract to make a will. When the opposing party presents evidence rebutting the presumption of due execution arising from recordation and notarization, there is a permissive inference for the jury to determine. The trial court invaded the province of the jury and acted as the fact finder when it concluded that the document was a valid contract to make a will.

Appeal by defendant Abernethy from judgment entered 5 January 2004 by Judge James W. Morgan in Burke County Superior Court. Heard in the Court of Appeals 26 January 2005.

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Wyatt, Early, Harris, Wheeler, LLP, by William E. Wheeler, for plaintiff-appellee.

Gorham, Crone, Mace & Green, LLP, by John W. Crone, III, Sigmon, Sigmon & Isenhower, by C. Randall Isenhower, and Kilpatrick Stockton, LLP, by James H. Kelly for defendant-appellant Abernethy.

STEELMAN, Judge.

Defendant, Don A. Abernethy, appeals the trial court's entry of judgment following a jury verdict, holding that Romer Gray Taylor (Romer) entered into a valid contract to convey his entire estate to his brother, plaintiff, Harvey C. Taylor, Jr. For the reasons discussed herein, we reverse and remand this matter for a new trial.

Romer was a lifelong resident of Burke County, North Carolina. Plaintiff was Romer's older brother. Defendant was Romer and plaintiff's nephew. Romer never married and had no children. Plaintiff moved to Pennsylvania after World War II and has continued to reside there. In 1978, plaintiff assisted Romer in the acquisition of a backhoe. On 7 October 1997, Romer executed a holographic will, which left his entire estate to defendant. On 22 October 1997, plaintiff filed a document with the Burke County Register of Deeds, which purported to be a contract to make a will between himself and Romer and was dated 10 July 1978. This contract stated that Romer would "immediately make a valid will devising to HARVEY C. TAYLOR and his heirs, assigns, and successors the entire estate of said ROMER GREY TAYLOR." The contract further provided that Romer agreed not to revoke the will made pursuant to its provisions. The contract was executed in the Commonwealth of Pennsylvania. Romer died on 18 January 1998. Following his death, defendant offered the holographic will for probate. Plaintiff instituted this action on 12 February 1998 seeking specific performance of the contract to make a will.

This matter initially came on for trial at the 29 August 2000 session of court. The jury found the signature of Romer on the contract to make a will was not genuine. Based upon this finding, the trial court dismissed plaintiff's action. Plaintiff appealed. On 19 March 2002, this Court filed an opinion finding error in part and remanded the case for a new trial. *Taylor v. Abernethy*, 149 N.C. App. 263, 560 S.E.2d 233 (2002), *disc. review denied*, 356 N.C. 695, 579 S.E.2d 102 (2003). We held the trial court erred in excluding plaintiff's proffered expert testimony concerning the genuineness of Romer's signature on

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the contract to make a will. *Id.* at 274-75, 560 S.E.2d at 240. We further held the trial court did not err in denying defendant's motion to dismiss based on Pennsylvania's six year statute of limitations. *Id.* at 275, 560 S.E.2d at 240-41.

This matter was retried before Judge James W. Morgan at the 1 December 2003 session of superior court. The trial judge submitted a single issue to the jury: "Is the signature on the document labeled Plaintiff's Exhibit A and entitled 'Contract to Make a Will' the genuine signature of Romer Gray Taylor?"

The trial court entered judgment in favor of plaintiff following the jury's determination that it was indeed Romer's signature on the contract. The trial court directed the administrator CTA to deliver the entire estate to plaintiff. From entry of this judgment, defendant appeals.

[1] We first address defendant's second argument in which he contends the trial court erred in permitting plaintiff's wife to testify concerning her conversations with the decedent, as well as permitting her to testify to conversations between plaintiff and Romer, which she overheard, as this violated Rule 601 of the North Carolina Rules of Evidence. We agree.

Rule 601, also known as the "dead man's statute," provides:

(c) *Disqualification of interested persons.*—Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic.

N.C. Gen. Stat. § 8C-1, Rule 601(c) (2005). To be disqualified as a witness interested in the event of the action, the witness must have a " 'direct legal or pecuniary interest in the outcome of the litigation.' " *Etheridge v. Etheridge*, 41 N.C. App. 39, 42, 255 S.E.2d 735, 738 (1979) (quoting *Burton v. Styers*, 210 N.C. 230, 231, 186 S.E. 248, 249 (1936)). " 'The key word in this phrase is 'legal,' " since a pecuniary interest

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alone is insufficient to disqualify a witness under Rule 601. *Rape v. Lyerly*, 287 N.C. 601, 622, 215 S.E.2d 737, 750 (1975) (citations omitted). The reason for this rule is that “[individuals] quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence.” *Sherrill v. Wilhelm*, 182 N.C. 673, 675, 110 S.E. 95, 96 (1921).

We hold that plaintiff’s wife was an interested party for purposes of Rule 601. N.C. Gen. Stat. § 29-30 provides:

[T]he surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share shall be entitled to take as his or her intestate share or elective share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture

N.C. Gen. Stat. § 29-30(a) (2005).

This section preserves to a surviving spouse the benefits that were formerly available as dower and curtesy. A surviving spouse is given this election so as not to be rendered penniless and would elect this option when the estate is small or insolvent. The statute limits the right of a married person to convey his or her real property free from the elective life estate provided by this section.

Taylor v. Bailey, 49 N.C. App. 216, 219, 271 S.E.2d 296, 298 (1980) (internal citations omitted). While both spouses are alive, the dower interests are referred to as being inchoate, since the right depends on the spouse owning the real estate dying first. *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 345, 451 S.E.2d 358, 362 (1994). “‘An inchoate dower interest is not an estate in land nor a vested interest, but nevertheless, it acts as an encumbrance upon real property.’” *Id.* (citations omitted). Indeed, “[a]lthough . . . an inchoate right of dower cannot be properly denominated an estate in land, nor indeed a vested interest therein, . . . it is a substantial right, possessing in contemplation of law the attributes of property, and to be estimated and valued as such.” *Bethell v. McKinney*, 164 N.C. 71, 75, 80 S.E. 162, 163 (1913).

A wife’s inchoate dower interest in her living husband’s land was held to render her incompetent to testify in a suit involving title to his land. Though common law dower has been abolished, the

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statutory scheme which replaced it seems to effect no change in the wife's status for this purpose.

Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 139, at 461-62 (6th ed. 2004).

In the case of *Linebarger v. Linebarger*, the caveators of a will sought to introduce testimony of the wife of one of the caveators concerning the testator's declarations. 143 N.C. 229, 55 S.E. 709 (1906). If the caveators prevailed, they would have acquired an interest in the real estate belonging to the testator. *Id.* at 231, 55 S.E. at 710. Our Supreme Court held, based on the wife's inchoate dower interest, that the wife "had an interest in the property dependent upon the result of the controversy and . . . was incompetent. The exception to the admission of her testimony must be sustained." *Id.* The Supreme Court based its holding on the dead man's statute as found in section 1631 of the Revised Code. *Id.* See Revised Code of North Carolina Ch. 34 § 1631 (1905). This statute was a predecessor to the current law embodied in Rule 601(c). The language of Section 1631 is identical to that found in Rule 601(c). *Linebarger* has not been overruled and is binding precedent. See *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("the Court of Appeals . . . has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court") (citation and internal quotation marks omitted).

In the instant case, plaintiff's wife's interest in Romer's real estate is the same as that of the witness in *Linebarger*. Plaintiff's wife has a direct legal interest in the property, thereby disqualifying her from testifying as to any oral communications between herself and Romer.

Plaintiff argues his wife's testimony was admissible under the holding of *Rape*, 287 N.C. 601, 215 S.E.2d 737. In *Rape*, the plaintiffs' father testified as to conversations he had with the deceased. Our Supreme Court affirmed the trial court's admission of the testimony, holding that where only personal property was at issue *Linebarger* was not applicable. *Id.* at 623-24, 215 S.E.2d at 751 (relying on *Helsabeck v. Doub*, 167 N.C. 205, 83 S.E. 241 (1914)).

In the case *sub judice*, Romer's estate includes substantial real estate holdings in this state. We therefore hold that plaintiff's wife was an "interested person" for purposes of Rule 601(c), and as a result, the trial court erred in admitting her testimony concerning oral communications she had with Romer. For these same reasons,

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plaintiff's wife should not be allowed to testify as to any conversations she overheard between her husband and Romer concerning Romer's intent to leave everything to plaintiff. Plaintiff does not contend that the admission of his wife's testimony was harmless and had no prejudicial effect on the outcome of the trial. As this testimony was inadmissible, we order a new trial.

Based upon this holding, we need not address the remainder of appellant's arguments presented to this Court. However, because this case has already been tried twice and we are remanding it for a third jury trial, we address those arguments which are likely to recur in an effort to prevent future appeals.

[2] In defendant's first argument, he contends the trial court erred in admitting into evidence two letters from Romer to plaintiff, as well as the envelopes which contained those letters. Defendant further contends the trial court erred in allowing the full contents of one of the letters to be read to the jury since it constituted hearsay. We disagree.

Specifically, defendant assigns as error the admittance of: (1) Exhibit 1(a), which is an original handwritten letter from Romer to plaintiff dated 3 April 1958; (2) Exhibit 1, which is the original envelope postmarked 3 April 1958 in which Exhibit 1(a) was mailed; (3) Exhibit 2(a), which is an original handwritten letter from Romer to plaintiff dated 23 March 1958; (4) Exhibit 1, which is the original envelope postmarked 25 March 1958 in which Exhibit 1(a) was mailed; and (5) Exhibit 1(e), which were defendant's answers to plaintiff's request for admissions.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2004). Thus, an out-of-court statement or document is considered to be hearsay evidence and, as such, inadmissible when the sole purpose for its submission into evidence is to prove the very contents of that document. *Leak v. Leak*, 129 N.C. App. 142, 152, 497 S.E.2d 702, 707-08 (1998). However, "[s]tatements offered for other purposes are not hearsay." *State v. Smith*, 135 N.C. App. 649, 656, 522 S.E.2d 321, 327 (1999) (holding statements offered to explain subsequent conduct or corroborate prior testimony were not hearsay, and were therefore admissible). See also *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56-7 (1990) (holding statement offered to show basis for subsequent conduct was not hearsay); *State v. Gilbert*, 96 N.C. App.

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363, 365, 385 S.E.2d 815, 816 (1989) (holding statement offered to corroborate testimony was not hearsay).

In the instant case, plaintiff offered the letters and their envelopes into evidence for the stated purpose of providing a sample of Romer's handwriting and signature, which the jury and the expert handwriting witnesses could compare to the signature on the contract to determine if Romer did in fact sign the contract to make a will. Plaintiff also offered these exhibits to corroborate Romer's plan or intent to make a will in favor of plaintiff, and rebut defendant's assertion that "Romer would never have signed anything like that." Furthermore, the letters were properly authenticated by one of Romer's nephew's, Chris Taylor, pursuant to Rule 901(b)(2) of the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 901(b)(2) (2004). Therefore, these letters were admissible. As such, it was proper for Chris Taylor to read one of them to the jury for the purpose of demonstrating Romer's motive in executing the contract to make a will, as well as corroboration of Romer's subsequent actions, that is, the execution of the contract. This argument is without merit.

[3] In defendant's fourth argument, he contends the trial court erred in allowing plaintiff's expert witness, Charles Perrotta, to give his opinion as to the genuineness of Romer Taylor's signature on the contract to make a will. We disagree.

Defendant suggests the trial court erred in permitting the handwriting expert to give his opinion that Romer's signature on the contract: (1) was not a tracing of Romer's signature done by someone else; (2) was not made by plaintiff; (3) was not made by plaintiff's son, Chris; and (4) was made by Romer and could not have been made by anyone other than him.

Trial courts are afforded wide latitude when determining the admissibility of expert testimony. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). As such, "a trial court's ruling . . . on the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Id.* In order to demonstrate that the trial court abused its discretion, the objecting party must show the court's ruling was so arbitrary that it could not have been the result of a reasoned decision. *Gregory v. Kilbride*, 150 N.C. App. 601, 612, 565 S.E.2d 685, 693 (2002), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 365 (2003).

In our previous opinion in this case, we held this same expert witness, Perrotta, was qualified to give his opinion as to whether the

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signature on the contract was Romer's after he met the factors set out in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). *Taylor*, 149 N.C. App. at 274-75, 560 S.E.2d at 240. We found this to be true regardless of whether Perrotta's testimony amounted to an expert opinion on the ultimate issue to be determined by the jury. *Id.* at 272, 560 S.E.2d at 239.

When testifying, an expert may explain how he reached his final conclusion. See N.C. Gen. Stat. § 8C-1, Rule 705 (2004) ("expert may testify in terms of opinion or inference and give his reasons therefor . . ."). It was permissible for Perrotta to explain to the jury how he came to the conclusion that Romer signed the contract. Furthermore, in light of defendant's assertion that Romer's signature on the contract was a forgery, plaintiff was allowed to rebut that theory with expert testimony.

Defendant has failed to meet his burden of showing that the trial court abused its discretion in allowing the handwriting expert to opine as to the matters set forth above, and ultimately as to whether Romer signed the contract. This argument is without merit.

[4] In defendant's sixth argument, he contends the trial court erred when it prohibited him from testifying about conversations he had with the decedent, Romer. We disagree.

As stated above, Rule 601 disqualifies certain witnesses from testifying. See N.C. Gen. Stat. § 8C-1, Rule 601. Under Rule 601, a witness will be prohibited from giving testimony about conversations he had with the decedent where the witness is a party to the action or has a direct pecuniary interest in the event. *Etheridge*, 41 N.C. App. at 42, 255 S.E.2d at 738. Defendant is a party to this action. In addition, he has a direct legal, as well as a pecuniary interest in the outcome of the action because if the contract is found to be valid, the purported holographic will naming him as the sole beneficiary would be of no legal effect. Thus, it was proper for the trial court to prohibit defendant from testifying regarding conversations he had with Romer. This argument is without merit.

[5] In defendant's eighth argument, he contends the trial court erred by instructing the jury that the burden of proof was by the greater weight of the evidence and in submitting only one issue, whether Romer signed the contract, to the jury.

We initially note that plaintiff contends defendant is foreclosed by the "law of the case doctrine" from raising this issue on appeal

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because he did not raise this issue on the first appeal. Our Supreme Court described this doctrine in *Tennessee—Carolina Transp., Inc. v. Strick Corp.*:

As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (citations and internal quotation marks omitted).

It is clear from our opinion in the first appeal of this case that defendant did not raise the issues of burden of proof and submission of the contract formation issue to the jury on cross-appeal. As such, they were not ruled on by this Court.

It appears there is a split of authority among the states as to whether the “law of the case doctrine” applies to “matters which arose prior to the first appeal and which might have been raised thereon but were not.” 5 AM. JUR. 2D *Appellate Review* § 608 (1995). Plaintiff urges this Court to adopt this broader version of the “law of the case doctrine.” We decline to do so.

We find no North Carolina cases adopting this expansive approach to this doctrine. To the contrary, our cases have specifically limited the doctrine to points actually presented and necessary for the determination of the case. *Creech v. Melnik*, 147 N.C. App. 471, 474, 556 S.E.2d 587, 589 (2001). In *Creech*, this Court held the law of the case doctrine did not apply to *dicta* contained in the prior appellate opinions of that case, but only to those issues which were in fact presented and necessary for deciding the case. *Id.* See also *Clayton v. Branson*, 170 N.C. App. 438, 443, 613 S.E.2d 259, 264 (2005); *Kanipe v. Lane Upholstery*, 151 N.C. App. 478, 484-85, 566 S.E.2d 167, 171 (2002).

We hold that defendant’s failure to cross-appeal these issues in the first appeal does not preclude him from raising them in this appeal. These issues were not actually decided, nor were they necessary for our decision in the first appeal.

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[6] We begin by addressing whether the trial court erred in instructing the jury that the burden of proof was by the greater weight of the evidence. Defendant contends that Pennsylvania law governs all aspects of the case due to the choice of law provision in the contract to make a will, which stated: "Pennsylvania law shall be applied in the construction and enforcement of this agreement." We interpret this to mean the substantive law of Pennsylvania would apply and not the procedural law, as the provision did not indicate the law of Pennsylvania would govern both the procedural and substantive law.

"The question of what is procedure and what is substance is determined by the law of the forum state." *Boudreau v. Baughman*, 322 N.C. 331, 339, 368 S.E.2d 849, 856 (1988). Where a lawsuit is filed in North Carolina regarding the validity of a contract made in another state, "[u]nquestionably the law of the forum, North Carolina, governs all matters of procedure." *Arnold v. Charles Enterprises*, 264 N.C. 92, 96, 141 S.E.2d 14, 17 (1965). In addition, the determination of the applicable burden of proof is a procedural matter, thus, it too is controlled by the law of the forum state. *Id.* at 98, 141 S.E.2d at 18. Accordingly, the trial court did not err in instructing the jury that the burden of proof was by the greater weight of the evidence as this is the correct standard under North Carolina law. *In re Rogers*, 297 N.C. 48, 59, 253 S.E.2d 912, 919 (1979) (noting the burden of proof in civil cases is by the greater weight of the evidence).

[7] We next address whether the trial court erred in refusing to instruct the jury on the essential elements necessary for the formation of a valid contract, such as whether there was an offer, acceptance, and valid consideration. Defendant contends the trial court impermissibly took the presumption of validity, which arose due to the fact the contract to make a will was signed, notarized, and recorded, and turned it into an unyielding conclusion.

As the validity of a contract is a substantive question, the law of Pennsylvania controls. *See Land Co., v. Wood*, 40 N.C. App. 133, 136-37, 252 S.E.2d 546, 550 (1979) (ruling the validity of a contract, as well as issues of its execution and interpretation are determined by the law of the place where it is made, thereby they are substantive issues). Plaintiff filed this lawsuit seeking the enforcement of a contract. "[A] contract to make a will . . . must be established by proof of an offer, an acceptance and legal consideration." *Hatbob v. Brown*, 575 A.2d 607, 609 (Pa. Super. 1990) (quoting *Fahringer v. Strine Estate*, 216 A.2d 82, 85-86 (Pa. 1966)).

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Although the substantive law of Pennsylvania governs issues concerning the validity of the contract, North Carolina law governs certain presumptions that arise from the execution and recordation of the contract at issue since this is a procedural matter. *See Knight v. Associated Transport*, 255 N.C. 462, 464, 122 S.E.2d 64, 66 (1961) (noting “the methods by which the parties are required to prove their allegations, such as the rule of evidence, and the quantum of proofs necessary to make out a *prima facie* case are matters of procedure governed by the law of the place of trial”); *Jacobsen v. McMillan*, 124 N.C. App. 128, 133, 476 S.E.2d 368, 371 (1996) (“a presumption is merely an evidentiary rule”).

Since the contract to make a will was notarized and recorded, this raised a presumption of due execution. *See Williams v. Board of Education*, 284 N.C. 588, 598, 201 S.E.2d 889, 895 (1974). Although plaintiff, as the party seeking to enforce the contract, has the burden of proving the essential elements of a valid contract, *Orthodontic Ctrs. of Am., Inc., v. Hanachi*, 151 N.C. App. 133, 135, 564 S.E.2d 573, 575 (2002), defendant, as the party attacking the validity of the contract on the basis of non-execution, has the burden of rebutting that presumption. *Johnson v. Johnson*, 229 N.C. 541, 545-46, 50 S.E.2d 569, 572-73 (1948). Rule 301 of our Rules of Evidence provides the guidelines for a trial court when instructing the jury regarding a presumption. The presumptions referred to in Rule 301 relate to mandatory presumptions. *See* N.C. Gen. Stat. § 8C-1, Rule 301 official commentary (2005). A mandatory presumption arises when, upon proof of a basic fact, “the presumed . . . fact *must* be found unless sufficient evidence of its nonexistence is forthcoming.” *Dobson v. Harris*, 352 N.C. 77, 82 n.3, 530 S.E.2d 829, 835 n.3 (2000) (quoting Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 44, at 148 (5th ed. 1998)). However, when the other party presents evidence rebutting the mandatory presumption it disappears, leaving only a mere permissive inference. *State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 729 (1994). A permissive inference permits, but does not require, the jury to infer the presumed fact from the basic fact proven. *Dobson*, 352 N.C. at 82 n.3, 530 S.E.2d at 835 n.3.

In the instant case, defendant put on evidence sufficient to rebut the presumption of due execution. Accordingly, the trial court erred when it took the presumption in favor of validity and found that “[b]ased on the evidence presented and the verdict of the jury, the Court concludes as a matter of law that Plaintiff’s Exhibit A is a valid and sufficient contract to make a will” By making such

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a finding, the trial court acted as the fact finder, thus invading the province of the jury.

Furthermore, the presumption in question goes to the issue of whether the document was properly executed, not whether it contained the elements necessary to be an enforceable contract. Regardless of the fact the contract to make a will was notarized and recorded, plaintiff still had the burden of establishing there was an offer, acceptance, and due consideration.

Defendant requested that the trial court submit the issue as to whether plaintiff had established all the elements for an enforceable contract, including whether there existed legal consideration. The trial judge refused, and in doing so, erred in failing to submit this issue to the jury.

We remand this matter for a new trial. We caution the lower court that upon remand this new trial is to be conducted based on the evidence presented at *that* trial. This evidence may or may not be the same as that presented at the previous trial. It is not the role of the trial judge upon retrial to follow the path taken by the judge in the previous trial. The judge must submit issues to the jury based on the evidence presented at the current trial.

REVERSED AND REMANDED.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. JEROME CANNON McCOY, DEFENDANT

No. COA04-1336

(Filed 18 October 2005)

1. Evidence— prior crimes or bad acts—assault inflicting serious injury

The trial court erred in an assault case by admitting and publishing to the jury evidence of a prior conviction for assault inflicting serious injury, and the case is remanded for a new trial, because: (1) the bare fact of a defendant's prior conviction would rarely, if ever, be probative of any legitimate Rule 404(b) purpose and the facts, and it is the circumstances underlying

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such a conviction that hold probative value; and (2) the bare fact of the nontestifying defendant's prior conviction was admitted and published to the jury in the instant case after testimony had been elicited to establish the factual basis underlying the conviction.

2. Assault— instruction—deadly weapon as a matter of law—knife

The trial court did not err or commit plain error by instructing the jury that a knife is a deadly weapon as a matter of law for the charge of assault with a deadly weapon inflicting serious injury given the evidence of the knife's use and the injuries produced.

3. Assault— deadly weapon inflicting serious injury—failure to instruct on lesser-included offenses

The trial court erred by failing to instruct the jury on the lesser-included offenses of assault with a deadly weapon and assault inflicting serious injury for the charge of assault with a deadly weapon inflicting serious injury, because: (1) the jurors were not instructed that defendant's hands were deadly weapons per se, but rather they were asked to determine whether defendant's hands became deadly weapons as used in the alleged assault; (2) there was no way to ascertain what verdict the jury might have reached had it been given an alternative which did not include the use of a deadly weapon; and (3) assault with a deadly weapon does not require the victim to suffer serious injury, and the victim in the instant case did not seek medical treatment nor does the record contain any evidence of pain, blood loss, or time lost from work as a result of the injuries.

4. Assault— deadly weapon inflicting serious injury—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury because the State's evidence, including documents from the domestic violence hearing that were admitted as substantive evidence, tended to show that defendant stabbed the victim five times with a knife causing wounds still visible some eight weeks after the assault, which adequately supported an inference that defendant assaulted the victim with a deadly weapon.

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5. Kidnapping— second-degree—motion to dismiss—sufficiency of evidence—restraint

The trial court did not err by denying defendant's motion to dismiss the second-degree kidnapping charges arising from the events of 18 November and 25 December 2002 even though defendant contends there was insufficient evidence of restraint, because: (1) hospital staff testified that defendant restrained the victim by refusing to allow her to seek medical treatment for a broken arm on or around 18 November 2002; and (2) an officer also testified that on 26 December 2002 the victim told him that defendant had been holding her against her will for days and would not let her contact her family.

6. Constitutional Law— double jeopardy—assault

The trial court violated defendant's right to be free of double jeopardy when it sentenced him in 03 CRS 79519 for both assault with a deadly weapon inflicting serious injury and assault inflicting serious injury, and in 03 CRS 71958 for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury, because: (1) N.C.G.S. § 14-33(c)(1) provides, just as N.C.G.S. § 14-32.4 does, that the section does not apply if the conduct is covered under some other provision of law providing greater punishment; and (2) although the evidence establishes assaults on two different days, it does not establish that two separate and distinct assaults occurred on each of the dates in question as opposed to multiple injuries arising from a single continuous transaction.

7. Sentencing— aggravating factors—failure to submit to jury

The trial court erred in an assault inflicting serious bodily injury, double assault inflicting serious injury, double assault with a deadly weapon, and double second-degree kidnapping case by imposing an aggravated sentence when no aggravating factor was admitted by defendant or found by the jury. Defendant would be entitled to a new sentencing hearing if defendant were not already awarded a new trial on other grounds.

8. Constitutional Law— effective assistance of counsel—failure to show deficiency

Defendant did not receive ineffective assistance of counsel in an assault inflicting serious bodily injury, double assault inflicting serious injury, double assault with a deadly weapon, and double second-degree kidnapping case by allegedly requesting the court

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to impose consecutive sentences on defendant, because: (1) the record indicates that defense counsel did not, in fact, request consecutive sentences; and (2) defendant failed to demonstrate how his counsel's performance was deficient.

Appeal by defendant from judgments entered 4 March 2004 by Judge Ripley E. Rand in the Superior Court in Guilford County. Heard in the Court of Appeals 18 May 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen S. Long, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant.

HUDSON, Judge.

On 7 July 2003, a grand jury in Guilford County indicted defendant, Jerome Cannon McCoy, for three counts each of assault inflicting serious injury, assault with a deadly weapon inflicting serious injury, and second-degree kidnapping. At the 23 February 2004 criminal session of the Superior Court in Guilford County, the court dismissed one count each of assault with a deadly weapon inflicting serious injury and second-degree kidnapping. A jury found defendant guilty of one count of assault inflicting serious bodily injury, two counts of assault inflicting serious injury, two counts of assault with a deadly weapon, and two counts of second-degree kidnapping. Based on its findings of aggravating factors, the court sentenced defendant to consecutive terms of imprisonment totaling more than sixteen years with credit for time served. Defendant appeals. For the reasons discussed below, we conclude that defendant is entitled to a new trial on all charges.

The State's evidence tended to show that sometime after Christmas 2002, Melanie Hope Hunt gave a written statement to Greensboro police stating that defendant had severely beaten her and restrained her against her will over the course of the past month and half. Hunt reported that between 9 through 13 November 2002, the defendant stabbed her five times with such force that the knife became stuck in one of her arms. She further stated that the defendant punched her so hard that she struck a wall, leaving an imprint and forcing the pair to move to a different motel.

Hunt told police that on 17 or 18 November 2002, the defendant beat her in the face, and twisted her arm until it fractured. After ini-

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tially refusing to take her to get medical treatment, defendant ultimately agreed to take Hunt to a hospital in High Point. Defendant instructed her to tell hospital staff that she had fallen out of the attic and broken her arm and that the stab wounds were puncture wounds she received trying to climb over a fence. Hunt further stated that on 24 and 25 December 2002, defendant beat her, threw her to floor on her broken arm, hit her in the stomach and back, and whipped her legs with a belt. She stated that on 25 December 2002 defendant would not allow her to see her family, and threatened to beat her each time she requested to go.

At trial, Hunt admitted writing these statements, but insisted that they were not true. She testified that she had written them only because she had caught the defendant in bed with another woman, and that she had written affidavits three different times asking the State to dismiss all the charges.

The State introduced expert medical testimony from the physician who treated Hunt at High Point Regional Hospital on 19 November 2002. Dr. Kevin Largen testified that Hunt's fractured arm was inconsistent with a fall from an attic, and more likely was caused by a twisting of the bone. He also noted that Hunt had bruises of different ages and a large abrasion on the upper part of her right arm. Based on Hunt's inconsistent statements and her delay in seeking treatment, Dr. Largen concluded that Hunt was a victim of domestic violence and contacted hospital social worker Karen Chance. Mrs. Chance testified that Hunt told her that defendant had been beating her regularly for the past twelve years and that he refused to get her treatment in Greensboro because she was a known victim of abuse at the hospitals there.

Officer S.V. Petteway of the Greensboro Police Department testified that on 26 December 2002 Hunt approached him at the Dollar General Store on High Point Road. He testified that as soon as Hunt began talking to him the defendant fled the store. Hunt told the officer that the defendant had been holding her for days, would not let her contact her family, had beaten her constantly and broken her arm. Officer Petteway took Hunt to her grandmother's house in Randolph County where she was admitted into a domestic violence shelter. Shelter manager Dolly Weeks testified that Hunt had told her that defendant had beaten her, broken her arm, and stabbed her five times.

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[1] Defendant argues that the trial court committed reversible error when it admitted and published to the jury evidence of a prior conviction for assault inflicting serious injury. He contends that the admission of such evidence was improper under N.C.R. Evid. 404(b) and was inherently prejudicial under the holding in *State v. Wilkerson*, 356 N.C. 418, 418, 571 S.E.2d 583, 583, *adopting per curiam*, 148 N.C. App. 310, 319, 559 S.E.2d 5, 10-11 (2002) (Wynn, J., dissenting). We agree.

Under Rule 404(b), evidence of a defendant's other crimes, wrongs or acts is inadmissible to show that the defendant acted in conformity therewith, but may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2002). In contrast to Rule 404(b), Rule 609 allows for the admission of a prior conviction for the limited purpose of impeaching a defendant's credibility as a witness if the evidence of the convictions is "elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2002).

Our courts have held that the distinction between Rule 404(b) and Rule 609 may not be blurred. *Wilkerson*, 148 N.C. App at 319, 559 S.E.2d 5, 11. This distinction is crucial because "the bare fact of a defendant's prior conviction would rarely, if ever, be probative of any legitimate Rule 404(b) purpose; instead, it is the facts and circumstances underlying such a conviction which hold probative value." *Id.* Further, "even if a conviction, in and of itself, held a scintilla of probative value for Rule 404(b) purposes, the inherent prejudicial effect of such a conviction would substantially outweigh its probativity, mandating its exclusion under Rule 403." *Id.* at 319-20, 559 S.E.2d at 11.

In *Wilkerson*, "testimony [from two law enforcement officers] concerning defendant's prior crimes . . . was admitted under Rule 404(b) to show defendant's intent and knowledge with respect to the charged drug offenses." *Id.* at 323, 559 S.E.2d at 13. A deputy clerk of court then testified that defendant had prior convictions on several drug charges. *Id.* at 311, 559 S.E.2d at 6. The trial court admitted both the officers' and the clerk's testimony under Rule 404(b). The defendant did not testify or present evidence. *Id.* at 312, 559 S.E.2d at 6. In his dissent, adopted by our Supreme Court, Judge Wynn noted that the defendant must be granted a new trial because:

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admitting the bare fact of a defendant's prior conviction, except in cases where our courts have recognized a categorical exception to the general rule . . . , violates Rule 404(b) . . . as well as Rule 403, as the bare fact of a prior conviction is *inherently* prejudicial such that any probative value of the conviction is substantially outweighed by the danger of unfair prejudice.

Id. at 327-28, 559 S.E.2d 5, 16 (emphasis supplied).

Here, the State elicited the testimony of Greensboro Police Officer Wall, who described the underlying facts of an assault committed by the defendant upon Hunt in 1995. However, he did not testify that this assault resulted in a criminal conviction. Following Officer Wall's testimony, the State introduced a certified copy of defendant's criminal conviction for assault inflicting serious injury resulting from the events described by Officer Wall. The trial court admitted both the testimony and the exhibit under Rule 404(b). Defendant did not testify.

While the trial court properly admitted Officer Wall's testimony under Rule 404(b), it erred in admitting the evidence of defendant's prior conviction pursuant to Rule 404(b). As in *Wilkerson*, the bare fact of a non-testifying defendant's prior conviction was admitted and published to the jury under Rule 404(b) after testimony had been elicited to establish the factual basis underlying that conviction. Because we are unable to distinguish this case from *Wilkerson*, we conclude that the trial court committed prejudicial error entitling defendant to a new trial.

Although we grant defendant a new trial as discussed above, we also address defendant's other assignments of error which could arise in a new trial.

[2] Defendant next contends that the trial court erred when it instructed the jury, in case No. 03 CRS 51797 ("Count Two"), that a knife is a deadly weapon as a matter of law for the charge of assault with a deadly weapon inflicting serious injury arising out of the events of 6 November 2002. Defendant did not object to these instructions, but he did assign plain error to them. Accordingly, we review this assignment of error under the plain error standard. *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002).

The plain error review requires this Court to review "fundamental errors or defects in jury instructions affecting substantial rights,

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which were not brought to the attention of the trial court.” To obtain relief under this rule, the defendant “must show that the omission was error, and that, in light of the record as a whole, the error had a probable impact on the verdict.” *State v. Bell*, 87 N.C. App. 626, 634-35, 362 S.E.2d 288, 293 (1987).

The defendant contends that it was improper to instruct the jury that a knife was a deadly weapon as a matter of law. A deadly weapon is not one that must kill, but rather one that is likely to cause death or great bodily harm. *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). The definition of “deadly weapon” can encompass most knives, but evidence in each case determines whether a specific knife is properly characterized as lethal. *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725-26 (1981).

“Whether a weapon is deadly is generally a decision for the court” *State v. Roper*, 39 N.C. App. 256, 257, 249 S.E.2d 870, 871 (1978). Only “where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury.” *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373-74 (1978) (internal citations omitted) (discussing a Pepsi-Cola bottle). “It has long been the law of this state that [w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring.” *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (1986) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)), *cert. denied* 479 U.S. 836, 93 L. Ed. 2d. 77 (1986) (emphasis in original omitted).

At trial, the State introduced statements made by Hunt during the restraining order proceedings, in which she stated that on or about 2 November through 5 November 2002, “Jerome McCoy stabbed me twice on my right upper arm, twice on my right leg . . . and once on my left (upper arm) [and] the knife got stuck in that arm.” Shelter manager Dolly Weeks testified that these wounds were still visible on 26 December 2002. Defendant presented no conflicting evidence as to the nature of the knife or its manner of use. Taking the evidence of the knife’s use and the injuries produced, we cannot conclude the trial court committed error, let alone plain error, when it instructed the jury that the knife used by defendant was a deadly weapon as a matter of law.

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[3] Defendant also argues that the court erred when it failed to instruct the jury in 03 CRS 51798 on the lesser included offenses of assault with a deadly weapon and assault inflicting serious injury for the charge of assault with a deadly weapon inflicting serious injury for the events of 18 November 2002. We agree.

A trial judge is required to “submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense was presented at trial.” *Lowe*, 150 N.C. App. at 686, 564 S.E.2d at 316. In *Lowe*, on facts similar to those here, this Court held that it was plain error for the trial judge not to submit misdemeanor assault as a lesser included offense of assault with a deadly weapon inflicting serious injury. *Id.* at 687, 564 S.E.2d at 316. The court in *Lowe* held that where the weapon used by the defendant could not properly be considered deadly as a matter of the law, the trial court should have given the jury the option to convict of an offense that did not require a deadly weapon. *Id.*

Here, the State presented evidence that tended to show that on or around 18 November 2002 defendant used his hands to twist Hunt’s arm until it broke. The jurors were not instructed that defendant’s hands were deadly weapons *per se*, but rather they were asked to determine whether defendant’s hands became deadly weapons as used in the alleged assault on Hunt. Consequently, “[t]here is simply no way to ascertain what verdict the jury might have reached had they been given an alternative which did not include the use of a deadly weapon.” *State v. Bell*, 87 N.C. App. at 635, 362 S.E.2d at 293 (holding that the failure to instruct on the lesser included offense of misdemeanor assault inflicting serious injury constituted plain error).

The court also erred by omitting from the instructions on the events of 18 November 2002, the lesser included offense of assault with a deadly weapon, which does not require that the victim suffer serious injury. A defendant “is entitled to an instruction on lesser included offenses if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000). “[W]hether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions.” *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000). “Pertinent factors for jury consideration include hospitaliza-

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tion, pain, blood loss, and time lost at work.” *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Here, Hunt did not seek medical treatment (allegedly because defendant would not allow her to do so), and the record does not contain any evidence of pain, blood loss or time lost from work as a result of her injuries. Because the jury could rationally have found defendant guilty of assault with a deadly weapon, the court erred by not instructing on that offense.

[4] Defendant also argues that the trial court erred when it denied his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury for the events of 6 November 2002. We disagree.

The standard of review on a motion to dismiss is well established. When ruling on a motion to dismiss the trial court must determine whether the State has introduced substantial evidence of each essential element of the crime and of the defendant being the perpetrator. *State v. Smith*, 357 N.C. 604, 615-16, 588 S.E.2d 453, 461 (2003), *cert. denied*, 124 U.S. 2915, 159 L. Ed. 2d 819 (2004) (internal citations and quotation marks omitted). Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion. *Id.* In reaching its decision, the trial court must consider the evidence in the light most favorable to the State giving the State the benefit of every reasonable inference. *Id.*

Defendant argues that the State presented no substantive evidence that the knife was a dangerous or deadly weapon, which is an essential element of assault with a deadly weapon inflicting serious injury. *See* N.C. Gen. Stat. § 14-32(b) (2003). Instead, defendant maintains that the only evidence of the nature of the knife and its manner of use was in the prior inconsistent statements of Hunt which were not offered as substantive evidence. The State’s evidence, including the documents from the domestic violence hearing which were admitted as substantive evidence, tended to show that the defendant stabbed Hunt five times with a knife causing wounds still visible some eight weeks after the assault. This evidence could adequately support an inference by the jury that the defendant assaulted Hunt with a deadly weapon. Thus, the court did not err in denying the defendants motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

[5] Defendant also argues that the trial court erred in denying his motion to dismiss the second-degree kidnaping charges arising from the events of 18 November (03 CRS 071958) and 25 December 2002 (03 CRS 071959). We disagree.

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The defendant's contention based on insufficiency of the evidence of restraint also fails. *See State v. Smith*, 160 N.C. App. 107, 119, 584 S.E.2d 830, 838 (2003) ("The offense of kidnaping is established upon proof of an unlawful, nonconsensual restraint, confinement or removal of a person from one place to another, for the purpose of: (1) holding the person for ransom, as a hostage or using them as a shield; (2) facilitating flight from or the commission of any felony; or (3) terrorizing or doing serious bodily harm to the person. See G.S. § 14-39(a).") Again defendant argues that the only evidence on this point was in the prior inconsistent statements of Hunt, which were not substantive evidence. However, staff from High Point Regional Hospital testified that defendant restrained Hunt by refusing to allow her to seek medical treatment for a broken arm on or around 18 November 2002. Officer Petteway also testified that on 26 December 2002 Hunt told him that the defendant had been holding her against her will for days and would not let her contact her family. In the light most favorable to the State, this and other evidence was sufficient to support the trial court's denial of defendant's motion to dismiss the charges of second-degree kidnaping.

[6] Defendant next argues that the court violated his right to be free of double jeopardy when it sentenced him in 03 CRS 79519 for both assault with a deadly weapon inflicting serious injury and assault inflicting serious injury, and in 03 CRS 71958 for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. Again, we agree.

Double jeopardy is prohibited both by the Fifth Amendment to the United States Constitution and by our State's common law. *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003) (citing *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972)). "The double jeopardy clause prohibits (1) a second prosecution for the same offenses after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense." *Id.* Defendant contends that he has been made subject to multiple convictions of assault for the same offense. "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003) citing *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000)). "This requires evidence of 'a distinct interruption in the original assault followed by a second assault.'" *Id.* at 132, 583 S.E.2d at 604-05 (quoting *Brooks*, 138 N.C. App. at 189, 530 S.E.2d at 852).

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The charges which defendant contends subjected him to double jeopardy are assault inflicting serious injury (pursuant to N.C. Gen. Stat. § 14-32.4) and assault with a deadly weapon inflicting serious injury (pursuant to N.C. Gen. Stat. § 14-32) for offenses on 6 November 2002, and assault inflicting serious injury and assault with a deadly weapon inflicting serious injury for offenses on 19 November 2002. The evidence tended to show that on 6 November defendant stabbed and beat the victim and threw her into a wall, while on 19 November, defendant struck the victim with his hands causing multiple bruises and abrasions and twisted her arm until it broke. In *Ezell*, the defendant was, as a result of a single incident, sentenced for assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(b) and assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4. This Court first observed that N.C. Gen. Stat. § 14-32.4 “makes an assault inflicting serious bodily injury a Class F felony ‘unless the conduct is covered under some other provision of law providing greater punishment.’ ” *Ezell*, 159 N.C. App. at 110, 582 S.E.2d at 684 (quoting N.C. Gen. Stat. § 14-32.4). Because defendant’s conviction under N.C. Gen. Stat. § 14-32(b) provided for greater punishment than N.C. Gen. Stat. § 14-32.4, this Court held that the trial court “cannot convict and sentence [a defendant] for both §§ 14-32 and 14-32.4 for the same conduct without violating the double jeopardy provisions of the United States and North Carolina constitutions.” *Id.* at 111, 582 S.E.2d at 685.

In this case, with respect to 18 November 2002, defendant was convicted of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) and assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4. This is precisely the same scenario found in *Ezell*. As for 6 November 2002, defendant was convicted of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) and misdemeanor assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1). Because N.C. Gen. Stat. § 14-33(c)(1) provides—just as § 14-32.4 does—that the section should not apply if the “conduct is covered under some other provision of law providing greater punishment,” the 6 November 2002 charges come under *Ezell* as well. Thus, we conclude we are bound by *Ezell*.

Here, we conclude that the evidence does establish assaults on two different days. However, it does not establish that two separate and distinct assaults occurred on each of the dates in question, as

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opposed to multiple injuries arising from a single continuous transaction. Thus, the evidence supported one assault conviction per day.

[7] Defendant also argues that the court erred in imposing an aggravated sentence when no aggravating factor was alleged in the indictment, admitted by defendant, or found by the jury. In light of our Supreme Court's decision on this issue in *State v. Allen*, 359 N.C. 425, — S.E.2d — (2005) overruling *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001), we agree.

In *Allen*, our North Carolina Supreme Court considered the application of *Blakely v. Washington*, 542 U.S. 296, —, 159 L. Ed. 2d 403, 412 (2004) to our State's Structured Sentencing Act. N.C. Gen. Stat. § 15A-1340 *et seq.* (2001). The Court held that:

The United States Supreme Court has made clear that the Sixth Amendment requires aggravating sentencing factors, like elements, to be found by a jury beyond a reasonable doubt. *Blakely*, — U.S. at —, —, 159 L. Ed. 2d at 413-14, 420. (See footnote 5) However, under North Carolina's current structured sentencing scheme, aggravating factors are completely withheld from jury review and are determined by a judge by a preponderance of the evidence. N.C.G.S. § 15A-1340.16. No impartial jury considers a defendant's evidence, arguments, and defenses during sentencing, *id.*, even when the aggravating factors advanced by the State are highly subjective in nature or disputed by the defendant. Moreover, aggravating factors are found to exist by a low standard of proof: a preponderance of the evidence. *Id.*

Allen, 359 N.C. at 444, — S.E.2d at —. The Court also concluded that "the harmless-error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to *Blakely*. Such errors are structural and, therefore, reversible *per se*." *Id.* at 444, — S.E.2d at —.

Here, the court sentenced defendant to the maximum aggravated range terms of imprisonment based on its finding of two aggravating factors: "the defendant committed the offense while on pretrial release for another charge" and "long and severe history of domestic violence perpetrated by Defendant on victim Melanie Hunt (12 years)." Even if we were not awarding defendant a new trial, he would be entitled to a new sentencing hearing on this basis.

[8] Defendant also argues that he received ineffective assistance of counsel in connection with his sentencing. We disagree.

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“To establish ineffective assistance of counsel a defendant must first show that his defense counsel’s performance was deficient.’” *State v. Poindexter*, 359 N.C. 287, 290-91, 608 S.E.2d 761, 764 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Defendant contends that his trial counsel requested that the court impose consecutive sentences on defendant, an action for which defendant asserts his counsel could not have had a valid reason. The record indicates that defense counsel did not, in fact, request consecutive sentences. Instead, he asked that defendant’s four convictions for Class F felonies be consolidated into a single mitigated sentence, to be followed by one consolidated “intermediate sentence” pursuant to N.C. Gen. Stat. § 7A-771 (3a) which would include anger management treatment, but no active jail time. Because defendant does not demonstrate how his defense counsel’s performance was deficient, we conclude that this assignment of error has no merit.

Defendant also assigns error to the court’s use of the disjunctive in instructing the jury on the charge of assault with a deadly weapon inflicting serious injury in 03 CRS 71957. Because we have awarded defendant a new trial on other grounds, we do not address this assignment of error.

New trial.

Judges HUNTER and GEER concur.

DAVID K. TRAYFORD, M.S., PETITIONER v. NORTH CAROLINA PSYCHOLOGY BOARD,
RESPONDENT

No. COA04-865

(Filed 18 October 2005)

Psychologists and Psychiatrists— licensure also as counselor—degree of supervision

The Psychology Board could not require petitioner to be supervised in his licensed professional counselor (LPC) practice by virtue of his psychological associate licensure (LPA) despite the fact that his activities need not be supervised under his LPC licensure. The General Assembly has enacted statutory limi-

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tations on a board's authority to regulate individuals that are not licensed by that board but that are qualified members of other professional groups, even if those individuals' activities arguably fall within the ambit of the board's regulatory authority. N.C.G.S. § 90-270.4(e), (g).

Judge JACKSON dissenting.

Appeal by petitioner from order entered 8 March 2004 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 February 2005.

Allen & Pinnix, P.A., by J. Heydt Philbeck and M. Jackson Nichols, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Sondra C. Panico, for the State.

CALABRIA, Judge.

David K. Trayford, M.S. ("petitioner") appeals an order of the Wake County Superior Court affirming the final decision of the North Carolina Psychology Board (the "Psychology Board"), which placed petitioner's license on probation for a period of two years. We reverse and remand.

Petitioner maintains two licenses in the State of North Carolina. He is licensed by the Psychology Board as a psychological associate ("LPA") and by the North Carolina Board of Licensed Professional Counselors ("Counselors Board") as a licensed professional counselor ("LPC"). In December of 1998, petitioner started providing group therapy to adult sexual offenders as a LPC with Carolina Consulting Associates. During this time, petitioner also conducted a non-offender psychoeducational support group for individuals closely associated with the offending individual. In addition to his LPC practice, petitioner also performed contract work as a LPA for Medicaid clients through the Randolph County Mental Health Center. While petitioner confirmed that he was supervised at all relevant times when he was engaged as a LPA, petitioner's LPC practice was not supervised until February of 2002.

Petitioner undertook comprehensive measures to keep his two practices distinct and separate. Petitioner maintained two separate offices for his two practices. He never held himself out as a LPA to his LPC clients. In fact, the Psychology Board admitted that petitioner

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had not “ever held himself out or otherwise represented himself” as a LPA to any person receiving services from him in his separate counseling practice. Petitioner used a separate disclosure statement in his counseling practice that did not reference his LPA licensure and separate letterheads for his two practices. Phone listings appeared under and solely referenced petitioner’s counseling practice, and there was no listing under psychology or any derivation of psychology. Petitioner testified that “someone from the general public” would not be able to see him under his LPA license but would have to be specifically referred by a mental health center.¹

When petitioner decided to discontinue his LPA work, he informed the Psychology Board, which subsequently triggered an investigation and led to disciplinary action. The Psychology Board found probable cause to believe petitioner had been engaged in activities in the scope of his LPC practice that required supervision for a LPA. In its final agency decision, the Psychology Board determined the same: “[i]f the activities [performed] meet the definition of those activities requiring supervision under [the Psychology Practice Act, petitioner] is required to receive such supervision no matter under which license he purports to be performing such activities.” The Psychology Board, accordingly, rejected petitioner’s attempt to “parse out” his activities between his LPC and LPA licenses. On petition for judicial review, the trial court affirmed the final agency decision. Petitioner appeals.

“On judicial review of an administrative agency’s final decision, the substantive nature of each assignment of error dictates the standard of review.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004). Reversal or modification of the agency’s final decision is permitted only when the reviewing court determines a petitioner’s substantial rights may have been prejudiced as a result of the agency’s findings, inferences, conclusions, or decisions being:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

1. Any clients referred in this manner were on Medicaid and seen by petitioner in his LPA practice as a properly supervised LPA.

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(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2003). The first four grounds are “law-based” inquiries warranting *de novo* review. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894. The latter two grounds are “fact-based” inquiries warranting review under the whole-record test. *Id.* Under *de novo* review, a court “considers the matter anew[] and freely substitutes its own judgment for the agency’s.” 358 N.C. at 660, 599 S.E.2d at 895 (citations and quotation marks omitted). Under the whole-record test, a court “examine[s] all the record evidence—that which detracts from the agency’s findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency’s decision.” *Id.*, 358 N.C. at 660, 599 S.E.2d at 895. “Substantial evidence” is “relevant evidence a reasonable mind might accept as adequate to support a conclusion.” N.C. Gen. Stat. § 150B-2(8b) (2003).

Petitioner’s practice of psychology is governed by the Psychology Practice Act. The Psychology Board, created under N.C. Gen. Stat. § 90-270.6 (2003), regulates the practice of psychology in North Carolina for the protection of the public health, safety, and welfare. *See* N.C. Gen. Stat. § 90-270.1 (2003). Petitioner’s practice of counseling is, conversely, governed by the Licensed Professional Counselors Act. The Counselors Board, created under N.C. Gen. Stat. § 90-333 (2003), regulates counseling services in North Carolina for the protection of the public health, safety, and welfare. *See* N.C. Gen. Stat. § 90-270.1 (2003). We need not delineate in this case the differences between the practices of counseling and psychology as petitioner’s LPA and LPC practices both fit neatly within the ambit of the Psychology Practice Act and the Licensed Professional Counselors Act.² One critical difference between the two statutory schemes, however, is that a LPA must be supervised when engaged in petitioner’s activities under N.C. Gen. Stat. § 90-275.5(e) (2003) while a LPC is not required to be supervised.

While the practices of counseling and psychology have spheres of confluence, the General Assembly has enacted statutory limitations

2. *Cf.* N.C. Gen. Stat. § 90-272.2(8) (2003) (defining the practice of psychology, in pertinent part, as the modification of human behavior using, *inter alia*, counseling and psychotherapy) and N.C. Gen. Stat. § 90-330 (2003) (defining counseling, in relevant part, as treating mental disorders using, *inter alia*, the counseling relationship and psychotherapeutic techniques).

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on a board's authority to regulate individuals that are not licensed by that board but that are qualified members of other professional groups, even if those individuals' activities arguably fall within the ambit of that board's regulatory authority. The Psychology Practice Act, for example, precludes the Psychology Board from preventing "qualified members of other professional groups from rendering services consistent with their professional training and code of ethics, provided they do not hold themselves out to the public by any title or description stating or implying that they are psychologists or are licensed, certified, or registered to practice psychology." N.C. Gen. Stat. § 90-270.4(e) (2003). In accord with the Psychology Practice Act, the Professional Counselors Act exempts LPCs licensed thereunder "from rules pertaining to counseling adopted by other occupational licensing boards." N.C. Gen. Stat. § 90-332.1(c) (2003). Despite these clear exemptions and the degree with which petitioner kept his LPC and LPA practices separate, the Psychology Board contends petitioner is subject to Psychology Board regulation by virtue of his LPA licensure and N.C. Gen. Stat. § 90-270.4(g), which provides as follows:

Except as otherwise provided in this Article if a person exempt from the provisions of [the Psychology Practice Act] and not required to be licensed under [the Psychology Practice Act] is or becomes licensed under [the Psychology Practice Act], he or she shall be required to comply with all conditions, requirements, and obligations imposed by Board rules or by statute upon all other psychologists licensed under [the Psychology Practice Act].

The critical issue before this Court is whether the Psychology Board can require petitioner to be supervised in his LPC practice by virtue of his LPA licensure despite the fact that such activities need not be supervised under his LPC licensure. Petitioner asserts the Psychology Board exceeded its statutory authority by concluding his activities violated applicable statutory provisions and wrongfully interpreted subsections (e) and (g) of N.C. Gen. Stat. § 90-270.4 (2003). This "law-based" inquiry warrants *de novo* review, and, as our resolution of these issues involves the interpretation of two statutory schemes, we initially set forth the relevant, guiding principles.

"The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). Thus, the court is to give clear and unambiguous statutory language "its natural and ordinary meaning unless the context requires other-

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wise.’” *Spruill v. Lake Phelps Vol. Fire Dep’t, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)). “If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to ‘defeat or impair the object of the statute . . . if that can reasonably be done without doing violence to the legislative language.’” *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *North Carolina Baptist Hosp., Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988)). In so doing,

a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means Statutory provisions must be read in context[,] [and those] dealing with the same subject matter must be construed in *pari materia*, as together constituting one law, and harmonized to give effect to each.

Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co., 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citations and quotation marks omitted). With respect to the Psychology Practice Act, we are also mindful that it is in derogation of the common law and is penal in nature and must, therefore, be strictly construed. *Elliott v. N.C. Psychology Board*, 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998).

We now turn to the Psychology Board’s argument that N.C. Gen. Stat. § 90-270.4(g) allows it to regulate petitioner’s LPC practice because he opted to obtain licensure as a LPA. We are of the opinion that this argument cannot be sustained. First, subsection (g) by its own terms operates unless “otherwise provided in th[e] [Psychology Practice Act,]” yet subsection (e) in the same statutory provision expressly allows petitioner, as a “qualified member[] of [an]other professional group[,]” *i.e.*, a LPC to “render[] services consistent with [his] professional training and code of ethics”³ Second, N.C. Gen. Stat. § 90-332.1, regardless of any seeming conflict in N.C. Gen.

3. This exemption is qualified by the requirement that the one claiming it not hold himself out in any way as a psychologist or psychological associate. As our previous discussion makes clear, petitioner scrupulously avoided doing so, and this qualification has no application in the instant case.

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Stat. § 90-270.4 unequivocally insulates petitioner as a “[p]erson[] licensed under [the Professional Counselors Act] . . . from rules pertaining to counseling adopted by other occupational licensing boards.” Third, the Psychology Board’s interpretation would discourage individuals from studying and achieving multiple licenses, despite the fact that such additional learning could only bolster learning in those areas falling within the auspices of multiple boards.⁴

Other practical considerations militate against the Psychology Board’s interpretation. For example, the Psychology Board’s interpretation would produce harsh results: in the instant case petitioner, duly licensed by the Psychology Board yet also licensed by the Counselors Board as a LPC, would be forced to adhere to the Psychology Board’s requirements despite the fact that those requirements were more onerous than the ones imposed by the Counselors Board and despite that his activities fall squarely within the ambit of the counseling. In such circumstances, the Psychology Board’s requirements would supercede and be paramount over those of the Counselors Board. Petitioner’s LPC practice would be at a material disadvantage to any other LPC practice conducted by another solely licensed as a LPC, despite the fact that the other individual would lack the benefit of petitioner’s additional education on the relevant subject matter. Moreover, petitioner would be forced, evidently, to surrender his Psychology Board license if he were not supervised before engaging in his LPC practice or face disciplinary action despite that his LPC practice falls entirely within his qualifications as determined by the Counselors Board. Finally, the Psychology Board’s position is in conflict with an opinion issued by the Attorney General’s office, which provides that qualified members of other professional fields of counseling need not be licensed as a psychology or psychological associate by the Psychology Board so long as (1) they do not hold themselves out or represent themselves as psychologists in any way, (2) their counseling is not simply an attempt to apply psychological principles and procedures under another label without acquiring a license as a psychologist, and (3) what they are doing is

4. The Psychology Board also asserts that governance by multiple boards can only better protect the public. That is only true, however, if either one or both of the boards granted authority to regulate a certain practice were deficient in the administration of their duties. Presupposing that both boards are equally capable of performing their duties, we see no advantage in redundant regulation. Moreover, to the extent the Psychology Board argues petitioner is being allowed to dictate which of the two boards will govern his two practices, we note petitioner’s extensive measures to keep separate his two practices will clearly indicate which board has the authority to regulate should a disciplinary issue arise.

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not principally psychology. As it is conceded that petitioner's activities fall both within the practices of psychology and counseling, we cannot say his activities are principally psychology any more than we can say his activities are principally counseling.

In light of these reasons, and the narrow construction that we are to apply in considering the Psychology Practice Act, we conclude petitioner may continue his LPC practice without interference from the Psychology Board so long as he remains a qualified and licensed professional counselor and is vigilant in not promoting that practice by holding himself out as a licensed psychological associate. The judgment of the trial court is reversed, and the case is remanded to the trial court with instructions to remand to the Psychology Board so that it may vacate the disciplinary action taken in accordance with this opinion.

Reversed and remanded.

Judges HUNTER concurs.

Judge JACKSON dissents with a separate opinion.

JACKSON, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority opinion.

As noted correctly by the majority, "[t]he primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). As such, this Court must give clear and unambiguous statutory language "its natural and ordinary meaning unless the context requires otherwise." *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)). "If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to 'defeat or impair the object of the statute . . . if that can reasonably be done without doing violence to the legislative language.'" *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *North Carolina Baptist Hosp., Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988)). In so doing,

a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phrase-

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ology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means Statutory provisions must be read in context[,] [and those] dealing with the same subject matter must be construed *in pari materia*, as together constituting one law and harmonized to give effect to each.

Proposed Assessments of Additional Sales & Use Tax v. Jefferson-Pilot Ins. Co., 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citations and quotation marks omitted). With respect to the Psychology Practice Act, it also is notable that the Act is in derogation of the common law and is penal in nature, and therefore, it must be strictly construed. *Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998).

Petitioner's practice of psychology is governed by the Psychology Practice Act. The Psychology Board, created pursuant to North Carolina General Statutes, section 90-270.6 (2003), regulates the practice of psychology in North Carolina for the protection of the public health, safety, and welfare. *See* N.C. Gen. Stat. § 90-270.1 (2003). The practice of psychology is defined, in relevant part, as the modification of human behavior through psychological principles "for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior. . . ." N.C. Gen. Stat. § 90-272.2(8) (2003). Among other things, counseling and psychotherapy expressly are included in the definition of the practice of psychology, *see id.*, and supervision is required for any LPA when engaging in such activities. N.C. Gen. Stat. § 90-270.5(e) (2003). However, "qualified members of other professional groups . . . rendering services consistent with their professional training and code of ethics" are exempt, "provided they do not hold themselves out to the public by any title or description stating or implying that they are psychologists or are licensed, certified, or registered to practice psychology." N.C. Gen. Stat. § 90-270.4(e) (2003). Nonetheless, North Carolina General Statutes, section 90-270.4(g) provides that, "[e]xcept as otherwise provided in [the Psychology Practice Act], . . . a person [who is or becomes licensed by the Psychology Board must] comply with *all* conditions, requirements, and obligations imposed by Board rules or by statute upon all other psychologists licensed under [the Psychology Practice Act]" even if that person otherwise would be "exempt from the provisions of [the Psychology Practice Act] and [is] not required to be licensed under [the Psychology Practice Act]." (Emphasis added.)

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The Licensed Professional Counselors Act governs Petitioner's practice of counseling. The North Carolina Board of Licensed Professional Counselors, created pursuant to North Carolina General Statutes, section 90-333, regulates counseling services in North Carolina for the protection of the public health, safety and welfare. *See* N.C. Gen. Stat. § 90-329 (2003). Counseling is defined, in relevant part, as the use of the counseling relationship and psychotherapeutic techniques to treat mental disorders and other conditions. N.C. Gen. Stat. § 90-330 (2003). Just as with the Psychology Practice Act, these types of activities performed by petitioner fall within the purview of counseling. *Id.* However, in contrast to the Psychology Practice Act, supervision is not a requirement for LPC's when counseling clients and they are exempt "from rules pertaining to counseling adopted by other occupational licensing boards" if "licensed under [the Licensed Professional Counselors Act]. . . ." N.C. Gen. Stat. § 90-332.1(c) (2003).

Necessarily, there will be individuals, such as petitioner in the instant case, who choose licensure under both schemes. In such cases, we must harmonize the two statutes. Read together, these statutory schemes lead to several conclusions. First, nothing in the record indicates petitioner's activities in his separate LPA and LPC practices fall outside of the contemplated purview of both the Psychology Practice Act and the Licensed Professional Counselors Act; therefore, petitioner would be permitted to engage in such therapeutic work as either a LPC or a LPA. Next, if petitioner were licensed solely as a LPC, North Carolina General Statutes, section 90-332.1(c) would deny the Psychology Board the authority to adopt rules governing petitioner's counseling practice because the Licensed Professional Counselor's Act contains a provision that specifically exempts LPC's from regulation under the Psychology Practice Act. North Carolina General Statutes, section 90-270.5(e) of the Psychology Practice Act permits petitioner's rendering of counseling services, were he solely licensed as a LPC, so long as he abstained from holding himself out to the public as a psychologist, or as one licensed, certified, or registered to practice psychology. In addition, because petitioner is not solely a LPC, but also is licensed by the Psychology Board, North Carolina General Statutes, section 90-270.4(g) operates as a bar to the general exemptions of North Carolina General Statutes, sections 90-332.1(c) and 90-270.4(e) and requires that petitioner also comply with Psychology Board rules and statutes applicable to other licensed psychologists under the Psychology Practice Act. Moreover, North Carolina General Statutes, section 90-270.4(g)

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explicitly provides that “if a person exempt from the provisions of [the Psychology Practice Act] and not required to be licensed under [the Psychology Practice Act] is or becomes licensed under [the Psychology Practice Act], he or she shall be required to comply with all conditions, requirements, and obligations imposed by Board rules or by statute upon all other psychologists licensed under [the Psychology Practice Act].” Therefore, it is clear that petitioner was on notice that he was required to comply with the supervision requirements of the Psychology Practice Act.

Accordingly, it is not sufficient for petitioner to show his activities fall within the purview of the Professional Counselors Act under the statutory provisions harmonized herein; he also must show that his activities fall outside the purview—and regulation—of the Psychology Practice Act. Because his activities do not, I would overrule these assignments of error and affirm the decision of the trial court.

LORI PEREZ, EMPLOYEE, PLAINTIFF v. AMERICAN AIRLINES/AMR CORP., EMPLOYER,
AIG VENDOR SERVICES, CARRIER, (ADMINISTERED BY SPECIALTY RISK SERVICES),
DEFENDANTS

No. COA04-1573

(Filed 18 October 2005)

1. Workers’ Compensation— indemnity compensation—time limitations—Form 60 payments—not a final award

A workers’ compensation plaintiff was not barred from further indemnity compensation by the time requirements of N.C.G.S. § 97-47, which limits review of awards to two years from the date of last payment. That statute applies only where there has been a final award; the Form 60 payments here were at most an interlocutory award resolving the issue of compensability but not the nature and extent of any disability.

2. Workers’ Compensation— disc injury—causation—testimony sufficient

The findings and conclusion of the Industrial Commission that a workers’ compensation plaintiff’s herniated disc was causally related to her compensable injury was supported by competent evidence.

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3. Workers' Compensation— disability award—causation—evidence sufficient

The Industrial Commission did not err by awarding a 10% permanent disability where there was competent evidence to support a finding that a workers' compensation plaintiff's herniated disc was causally related to her injury.

4. Workers' Compensation— additional medical treatment—presumption

A workers' compensation plaintiff was entitled to the presumption that additional medical treatment for her back injury was directly related to the compensable injury. Although defendant pointed to testimony that it was impossible to say whether plaintiff's back problems were related to the injury, the weight of that testimony is properly determined by the Commission.

Appeal by defendants from opinion and award entered 31 August 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 June 2005.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Kimberley A. D'Arruda, for defendants-appellants.

Scudder & Hedrick, by John A. Hedrick, for plaintiff-appellee.

ELMORE, Judge.

Lori Perez (plaintiff) was employed by American Airlines/AMR Corporation (defendant) as a flight attendant beginning in 1983. On 3 July 1998 plaintiff was performing her job duties in London, England. While walking down a stairway carrying luggage, she slipped and fell. Plaintiff landed on her buttocks and immediately felt pain in her right leg, right hip, and lower back. Defendant filed a Form 60, admitting plaintiff's right to compensation, with the North Carolina Industrial Commission (Commission) on 17 July 1998. Pursuant to the Form 60, defendant paid plaintiff compensation for temporary total disability beginning on 9 July 1998 at a rate of \$532.00 per week.

Plaintiff was treated by Dr. Dwayne Patterson beginning in August of 1998. Plaintiff returned to her position as a flight attendant on 1 November 1998. In April of 2000, plaintiff suffered a flare-up of the lower back pain symptoms she had been experiencing since the 1998 injury. Plaintiff testified that she received treatment from Dr. Patterson and was able to return to work in June of 2000. Defendant

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filed a Form 28B with the Commission stating that plaintiff's last indemnity compensation was paid on 21 June 2000 and that her last medical compensation was paid on 18 September 2000.

Following the events of 11 September 2001, plaintiff decided to resign from her position as a flight attendant in November of 2001. In January of 2002, plaintiff began a new position as a bank teller at RBC Centura. Plaintiff testified that her lower back pain started to intensify again in the spring of 2002. Plaintiff began receiving treatment from Dr. Dale Patrick, a chiropractor, on 23 July 2002. Dr. Patrick suspected that plaintiff might have a herniated disc. Plaintiff's condition worsened, and she was evaluated in the emergency department of Rex Hospital on 30 July 2002. Dr. Dennis Bullard reviewed plaintiff's MRI, which revealed that she had a herniated disc at L5-S1. Subsequently, on 2 August 2002, Dr. Bullard performed a microdiscectomy at L5-S1. Plaintiff stated that, due to her treatment and surgery, she was unable to work from 29 July 2002 through 30 August 2002. She returned to her position at RBC Centura and worked part-time through the end of September 2002, at which time she returned to full-time work.

Plaintiff filed a Form 18M, requesting additional medical compensation for her back injury, on 29 August 2002. Plaintiff also filed a Form 33 request for a hearing, claiming additional indemnity compensation. Defendant filed a response to plaintiff's request for hearing, denying her claims for additional compensation. The claims were heard before Deputy Commissioner George R. Hall on 13 May 2003. Deputy Commissioner Hall entered an opinion and award on 29 December 2003 awarding plaintiff temporary total disability compensation from 22 July 2002 through 2 September 2002; temporary partial disability compensation from 3 September 2002 through 26 September 2002; permanent partial disability compensation for 30 weeks beginning 6 January 2003; and additional future medical compensation. Defendant appealed to the Full Commission. On 31 August 2004 the Commission entered an opinion and award affirming the opinion and award of Deputy Commissioner Hall. Defendant filed timely notice of appeal to this Court.

Defendant raises the following issues on appeal: (1) whether the Commission erred in concluding that plaintiff's claim for additional indemnity compensation was not time-barred under Section 97-47 of our General Statutes; (2) whether the Commission erred in finding and concluding that plaintiff's herniated disc was causally related to her compensable injury of 1998; and (3) whether the Com-

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mission erred in concluding that plaintiff was entitled to additional medical compensation under N.C. Gen. Stat. § 97-25. We affirm on all three issues.

Applicability of Section 97-47

[1] Defendant asserts that plaintiff's claim for additional indemnity compensation was barred under the time limitations stated in N.C. Gen. Stat. § 97-47. Section 97-47 provides, in pertinent part, that

upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . [N]o such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article[.]

N.C. Gen. Stat. § 97-47 (2003). It is undisputed that plaintiff filed her claim for additional indemnity compensation more than two years after the final payment of indemnity compensation. Nonetheless, plaintiff's claim was not time-barred if the statute has no applicability to the facts here. N.C. Gen. Stat. § 97-47 applies only where there has been a final award of workers' compensation benefits. *See Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 60, 359 S.E.2d 261, 262 (1987) (citing *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E.2d 27 (1960)), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988). We agree with defendant that an employer's payment of compensation pursuant to a Form 60 filed with the Commission is an enforceable award on the compensability of the employee's injury. *See* N.C. Gen. Stat. § 97-82(b) (2003) (payments pursuant to N.C. Gen. Stat. § 97-18(b), Form 60 payments, "shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made."). However, we reject defendant's argument that an employer's Form 60 payments constitute a *final* award within the meaning of N.C. Gen. Stat. § 97-47.

The applicability of N.C. Gen. Stat. § 97-47 to an award which determines some aspects of the employee's claim but does not resolve permanent disability was addressed in *Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 359 S.E.2d 261 (1987). In *Beard*, the plaintiff-employee injured her back during a work-related accident. The Commission approved a Form 21 agreement executed by the par-

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ties, wherein the employer admitted liability under the Workers' Compensation Act and agreed to pay the plaintiff compensation at a specified rate. *Beard*, 87 N.C. App. at 58-59, 359 S.E.2d at 261. The plaintiff returned to work and received the insurance carrier's final compensation payment in 1980. *Id.* at 59, 359 S.E.2d at 261. Following a surgery for a ruptured disc in 1983 and a recovery period, the plaintiff filed a claim for additional compensation in 1985. *Id.* The Commission concluded that the plaintiff's claim was time-barred under N.C. Gen. Stat. § 97-47 because the Form 21 agreement constituted a final award and the plaintiff failed to file the claim for additional compensation within two years of the last payment of compensation. *Id.* at 59-60, 359 S.E.2d at 261-62. This Court reversed, concluding that the Form 21 agreement was an interlocutory award because it did not determine the extent of the plaintiff's permanent disability. *Id.* at 60, 359 S.E.2d at 262. In fact, the agreement "said nothing about plaintiff either having or not having a permanent disability." *Id.* The Court explained that N.C. Gen. Stat. § 97-47 was enacted to "establish[] conditions under which otherwise final disability awards can be reviewed and revised when changes occur; it does not establish either a procedure or a limitations period for processing unresolved claims for permanent disability." *Id.* at 63, 359 S.E.2d at 264.

In the instant case, the Form 60 filed by defendant does not resolve the extent of plaintiff's permanent disability. Indeed, like the Form 21 agreement at issue in *Beard*, the Form 60 does not mention permanent disability. At most, the Form 60 payments were an interlocutory award resolving the issue of compensability but not the nature and extent of any disability. *See Watts v. Hemlock Homes of the Highlands, Inc.*, 141 N.C. App. 725, 729, 544 S.E.2d 1, 3 (2001) ("By executing a Form 60 and paying compensation pursuant thereto, a defendant admits *only the compensability* of the employee's injury.") (emphasis added). The Form 60 payments of temporary total disability compensation did not constitute a final award contemplated by N.C. Gen. Stat. § 97-47. Thus, the Commission did not err in concluding that N.C. Gen. Stat. § 97-47 did not apply to bar plaintiff's claim for further indemnity compensation.

Causal Relationship

[2] Next, defendant argues that there was no competent evidence to support the findings and conclusion of the Commission that plaintiff's herniated disc was causally related to her compensable injury of July

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1998. The Commission made the following findings of fact on the expert causation testimony:

17. Dr. Bullard stated that he felt it was possible for plaintiff as a result of her injury at work to have sustained the injury she described and the damage to ligamentous structures which resulted in the ruptured disc on which he operated in 2002. He also stated that plaintiff's herniated disc was related to her compensable injury based upon her history of continuous recurrent symptoms since the time of the injury and the absence of those symptoms before the injury. Dr. Bullard felt to a reasonable degree of medical probability that plaintiff's central disc herniation at L5-S1 and her need for a microdiscectomy was a direct and natural result of her injury in 1998.

18. At his deposition Dr. Patterson stated that the right-sided disc herniation at L5-S1 could have provided the same symptoms for which he treated her in 2000 and that the herniation could have progressed over time.

19. Dr. Patrick expressed his opinion that it was highly probable that plaintiff's compensable injury by accident caused the disc insult that led to the herniation in 2002.

20. The Full Commission finds based upon the greater weight of the credible medical evidence that plaintiff's herniated disc was causally related to her compensable injury on July 3, 1998. The treatment she received for her low back condition in 2002 was reasonably necessary to effect a cure, provide relief and lessen her period of disability.

First, defendant asserts that the causation opinions of Dr. Patrick and Dr. Bullard are mere conjecture or speculation. We disagree. Dr. Patrick opined that it was "highly probable" that the July 1998 injury caused the disc insult that led to the herniation. Dr. Bullard expressed his causation opinion that the disc herniation and need for a microdiscectomy were a direct and natural result of the 1998 injury "to a reasonable degree of medical probability." These statements are sufficient to support a finding of a causal relationship between the medical condition and the work-related injury. *See Adams v. Metals USA*, 168 N.C. App. 469, 482, 608 S.E.2d 357, 365 (holding that testimony was sufficient to support finding of causation when doctor testified that if the plaintiff was asymptomatic before he fell and developed symptoms after he fell, then the doctor "certainly

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believe[d]” that the fall caused the plaintiff’s injury), *aff’d per curiam*, 360 N.C. 54, — S.E.2d — (7 October 2005) (No. 156A05). As has been previously stressed, it is not “the role of this Court to comb through the testimony and view it in the light most favorable to the defendant Although by doing so, it is possible to find a few excerpts that might be speculative, this Court’s role is not to engage in such a weighing of the evidence.” *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005).

Defendant points out that Dr. Patterson, in contrast to the other two experts, testified that it was possible that plaintiff’s herniated disc was related to her injury in 1998 but that he could not make this connection to a reasonable degree of medical certainty:

Q. So would you agree that at this point in time, it would be speculation to relate the herniated disc in July of 2002 to the work injury in 1998?

A. I think it’s—yeah, I think it’s hard to say. I think it’s specul—I guess you would say it’s speculative. I mean, there’s just no way to say for sure. I mean, it’s possible, but it’s not definite.

After reviewing the evidence and the testimony of the expert witnesses, the Commission found, in finding of fact number 20, that plaintiff’s herniated disc was causally related to her compensable injury based upon the greater weight of the credible medical evidence. Defendant’s argument regarding the credibility of Dr. Bullard and Dr. Patrick in light of Dr. Patterson’s testimony must fail, as the Commission could have found the testimony of these two expert witnesses more credible than the testimony of Dr. Patterson. *See Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (determining credibility and the weight to be given witness testimony is the role of the Commission). As there is competent evidence to support the Commission’s findings of the causal relationship between the treatment in 2002 and the injury in 1998, we are bound by them. *Id.* at 681, 509 S.E.2d at 414. The Commission’s corresponding conclusion of law that plaintiff’s herniated disc was causally related to the compensable injury of 1998 is supported by its findings.

[3] Defendant also challenges the finding that, as a result of the 1998 injury, plaintiff has a 10% permanent functional impairment of her back. This finding is supported by the medical opinion of Dr. Bullard, who assigned a 10% permanent impairment rating to plaintiff’s disc

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injury. Defendant does not dispute Dr. Bullard's opinion that plaintiff suffered a 10% permanent impairment as a result of the herniated disc. Instead, defendant argues that the opinion is immaterial because there is no competent evidence that the herniated disc is causally related to the compensable injury of 1998. However, as discussed *supra*, there is competent evidence in the record to support the finding that plaintiff's herniated disc was causally related to the 1998 injury. The Commission did not err in awarding plaintiff compensation for a 10% permanent disability.

Additional Medical Compensation

[4] Finally, defendant contends that the Commission erred in concluding that plaintiff was entitled to additional medical compensation under N.C. Gen. Stat. § 97-25. Specifically, defendant assigns error to conclusion of law number 2, in which the Commission stated that plaintiff was entitled to a rebuttable presumption that the herniated disc was directly related to the original compensable injury and that defendant failed to rebut this presumption.

Defendant argues that the Commission misapplied the law by concluding that the *Parsons* presumption applies to plaintiff's claim for additional medical compensation. A party seeking additional medical compensation pursuant to N.C. Gen. Stat. § 97-25 must establish that the treatment is "directly related" to the compensable injury. *See Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. *See Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury. *Reinninger*, 136 N.C. App. at 259, 523 S.E.2d at 723.

The employer's filing of a Form 60 is an admission of compensability. *See Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (employer filing Form 60 pursuant to N.C. Gen. Stat. § 97-18(b) "will be deemed to have admitted liability and compensability"), *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001). Thereafter, the employer's payment of compensation pursuant to the Form 60 is an award of the Commission on the issue of compensability of the injury. *See* N.C. Gen. Stat. § 97-82(b); *Calhoun v.*

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Wayne Dennis Heating & Air Cond., 129 N.C. App. 794, 798, 501 S.E.2d 346, 349 (1998), *review dismissed*, 350 N.C. 92, 532 S.E.2d 524 (1999). As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context. Although this is an issue of first impression, we are guided by this Court's parallel analysis of the presumption of continuing disability created by a Form 21 agreement between the parties to a workers' compensation claim. A Form 21 agreement, when properly executed by the parties and approved by the Commission, is an admission of disability. *See Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). A plaintiff is entitled to a presumption of continuing disability in this context because the approved Form 21 "is the equivalent of proof that plaintiff is disabled." *Id.* (internal citation omitted). It follows logically that because payments made pursuant to a Form 60 are an admission of compensability under the Workers' Compensation Act, these payments are the equivalent of an employee's proof that the injury is compensable. As compensability has been determined by the employer's Form 60 payments, the *Parsons* presumption applies to shift the burden to the employer.

Defendant asserts that a Form 60 cannot give rise to the *Parsons* presumption unless the plaintiff's claim for compensation has been "approved" by the Commission. We reject this assertion. Defendant cites to *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 514 S.E.2d 517 (1999). In that case, the plaintiff's claim for workers' compensation benefits was denied by the deputy commissioner, and the decision by the deputy commissioner was affirmed by the Full Commission. *Porter*, 133 N.C. App. at 25, 514 S.E.2d at 520. The Court stated that, because the Commission had not "approved" the plaintiff's claim, the *Parsons* presumption did not apply and the plaintiff had the burden of establishing a causal relationship between the work-related incident and her medical conditions. *Id.* at 28, 514 S.E.2d at 521. The facts of *Porter*, which do not include the filing of a Form 60 by the employer, are readily distinguishable from the facts of the case at bar. Because defendant stipulated to the compensability of the injury here, plaintiff was entitled to a rebuttable presumption that the medical treatment for her back injury was directly related to the original compensable injury.¹

1. Defendant also argues that plaintiff's herniated disc was a different injury from the injury stated on the Form 60 and, therefore, the admission of compensability does not cover this later and distinct injury. Defendant described the injury on the Form 60

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Defendant offers no expert testimony or affirmative medical evidence tending to show that the treatment for plaintiff's herniated disc is not directly related to the compensable injury of 1998. Although defendant emphasizes that Dr. Patterson stated that it was impossible to say whether plaintiff's back problems of 2002 were related to the injury of 1998, Dr. Patterson also testified that the herniation was within an inch or two of the location where he treated plaintiff in 2000 and that "there's no doubt that you can start with a small disc herniation or a bulge or something and it can progress over a period of time[.]" Dr. Patterson last evaluated plaintiff on 5 June 2000, and his testimony is equivocal on whether the symptoms of 2002 could be directly related to the symptoms that continued from 1998 through 2000. The weight of the testimony is properly determined by the Commission, not by this Court. *See Adams*, 349 N.C. at 680, 509 S.E.2d at 413. Defendant has failed to rebut the presumption that the treatment in 2002 was directly related to the injury of 1998. As such, we hold that the Commission did not err in concluding that plaintiff was entitled to a presumption that additional medical treatment for her back injury was directly related to the 1998 compensable injury.

For the reasons discussed above, we affirm the opinion and award of the Commission.

Affirmed.

Judges CALABRIA and GEER concur.

as "Sprain, Strain Lower Back." However, the section provided for this description of the injury is located below a caption stating, "THE FOLLOWING IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE AN AGREEMENT[.]" The presumption of compensability applies to future symptoms allegedly related to the original compensable injury. We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.

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STATE OF NORTH CAROLINA v. GLENN DEVON McKINNEY

No. COA04-1653

(Filed 18 October 2005)

Search and Seizure— motion to suppress evidence—unlawful entry—fruit of the poisonous tree

The trial court erred in a first-degree murder case by denying defendant's motion to suppress the evidence found during the search of the victim's residence at which defendant also resided, and defendant is entitled to a new trial, where the victim's brother removed a window air conditioner in order to enter the residence and allowed officers to enter, officers entered without a search warrant and discovered what appeared to be bloodstains, and officers then obtained a search warrant and discovered the victim's body in the residence, because: (1) defendant had an expectation of privacy in the residence and had standing to challenge the officers' initial warrantless entry into the residence; (2) exigent circumstances did not exist to justify the officers' warrantless entry into the residence; (3) the State waived claims that defendant had abandoned the residence and that the evidence would have been inevitably discovered by its failure to rely on those claims to defeat defendant's motion to suppress at trial; and (4) the officers' initial warrantless entry into the residence was unlawful and the subsequent search warrant was based upon "fruit of the poisonous tree."

Appeal by defendant from judgment entered 16 April 2004 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 25 August 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Paul F. Herzog for defendant-appellant.

TIMMONS-GOODSON, Judge.

Glenn Devon McKinney ("defendant") appeals his conviction for first-degree murder. For the reasons stated herein, we reverse.

The State's evidence presented at trial tends to show the following: On 17 May 2003, law enforcement officers from the Greensboro Police Department discovered the body of Jerry Louis Alston

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(“Alston”) in the laundry room of his residence. Alston’s body was inside a city-issued trash can, which had been covered with a towel and two candles. Beneath the candles and towel was a computer-generated note reading “Glenn Devon McKinney did this.”

Greensboro Police Department Sergeant Jane Allen (“Sergeant Allen”) was the first law enforcement officer to enter Alston’s residence the day his body was discovered. Sergeant Allen had gone to Drexel Road in Greensboro, North Carolina, in an effort to investigate an “assault [that] was supposed[] to have taken place.” Earlier that day, Greensboro Police Department Sergeant D.S. Morgan (“Sergeant Morgan”) notified Sergeant Allen that “someone named Phoenix may have killed someone named Jerry somewhere on Drexel Road.” Sergeant Morgan subsequently informed Sergeant Allen that an individual named Amy Millikan (“Millikan”) “had said that her roommate had told her that her roommate’s friend had told her that her boyfriend named Phoenix had advised that he had killed or assaulted an individual named Jerry on Drexel Road.” As Sergeant Allen was approaching Drexel Road, she was informed that Alston’s residence was “the house that seemed to match the description that was being given” by an individual named Aja Snipes (“Snipes”), as well as neighbors.

When Sergeant Allen arrived at Alston’s residence, she noticed that the residence “appeared to be secure[,]” that the curtains or blinds of the residence were drawn, and that there was a small dog tied to a short leash near the rear of the residence. Sergeant Allen did not force entry into the residence at that time, because “[a]t that point [she] needed more to go on” and “didn’t know for sure that an assault had occurred in there.” Shortly thereafter, Sergeant Morgan notified Sergeant Allen that defendant was reported to be driving Alston’s vehicle. Sergeant Allen noticed that the vehicle was not in Alston’s driveway, and she began to speak to Irma Alston (“Irma”), Alston’s sister. Irma told Sergeant Allen that Alston lived at the residence. Alston’s brother, Ricky Alston (“Ricky”), subsequently arrived at the residence. Ricky informed Sergeant Allen that “he, like his sister, had not heard from [Alston] for at least several days” Sergeant Allen thereafter contacted Alston’s employer. Although Ricky was “extremely concerned about the well-being of his brother[,]” based upon the information that had been presented to her, Sergeant Allen did not believe it was necessary to enter the residence. Instead, she believed she should continue her investigation in order to determine whether forced entry was necessary.

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Sergeant Allen then “left briefly” to use the restroom. When she returned, Ricky had removed an air conditioning unit from a window and entered the residence. After Ricky “allowed” Sergeant Allen and Sergeant Morgan to enter, the officers walked through the residence. In a bedroom of the residence, Sergeant Allen observed “what appeared to be some dark spots on the wall.” Sergeant Allen believed the spots were “some sort of high velocity spatter[,]” and she “considered the possibility” that the spots might be blood and that “some sort of an assault . . . might have taken place within the room.” She noticed more dark colored liquid stains on the television, bed, chair, and carpet. Sergeant Allen asked Ricky whether he had seen the spots before. Ricky replied that he had not, and that he believed “perhaps maybe it was paint or something.” Sergeant Allen thereafter “decided that a search warrant would be needed to proceed any further inside the residence.” Sergeant Allen instructed Ricky to leave the residence, and she directed those officers outside the residence to secure the residence while she obtained a search warrant.

After obtaining a search warrant, Sergeant Allen returned to Alston’s residence with Greensboro Police Department Detective David Spagnola (“Detective Spagnola”). While crime scene technicians investigated the bedroom, Sergeant Allen and Detective Spagnola noticed a large, city-issued trash can in the laundry room of the residence. The officers believed it was unusual for the trash can to be inside, and Detective Spagnola attempted to lift it. After Detective Spagnola was unable to lift it, Sergeant Allen believed that there might be a victim inside the trash can. The officers thereafter asked the crime scene technicians to photograph the trash can and its contents. When the officers opened the trash can, they discovered Alston’s body inside.

Greensboro Police Department Corporal Michael McIntosh (“Corporal McIntosh”) was speaking with Snipes while Alston’s residence was being searched. Corporal McIntosh had learned that Snipes was defendant’s girlfriend, and that defendant was living with Alston at the residence. During their ensuing conversations, Snipes informed Corporal McIntosh that she had spoken with defendant earlier that week and that defendant had admitted killing Alston. Snipes also informed Corporal McIntosh that defendant called her to apologize for “g[etting] her involved in the situation” and to request that she wire him money in Florida. Corporal McIntosh thereafter asked Snipes to aid him in convincing defendant to turn himself over to the police.

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Defendant subsequently turned himself over to the Greensboro Police Department and, on 21 July 2003, he was indicted for the first-degree murder of Alston. Defendant's trial began the week of 12 April 2004. Prior to trial, defendant filed a motion to suppress the evidence seized during the search of Alston's residence. Following a hearing on 8 April 2004, the trial court denied defendant's motion. At trial, defendant testified that he and Alston had been fighting the night of Alston's death, and that he killed Alston in self-defense. On 16 April 2004, the jury found defendant guilty of the first-degree murder of Alston. After finding that defendant had a prior felony record level III, the trial court sentenced defendant to life imprisonment without parole. Defendant appeals.

The dispositive issue on appeal is whether the trial court erred by denying defendant's motion to suppress the evidence found during the search of Alston's residence. Defendant argues that the police officers' initial entry into the residence was unlawful, and that the subsequent search warrant was based upon "fruit of the 'poisonous' tree." We agree.

We note initially that while defendant filed a pretrial motion to suppress the evidence seized during the search of Alston's residence, he failed to object at each instance during the trial when this evidence was presented. Although our legislature has recently amended the Rules of Evidence to provide that "[o]nce the [trial] court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal[.]" N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2003), this Court has more recently held that this amendment was unconstitutional as it is inconsistent with N.C.R. App. P. 10(b)(1). *State v. Tutt*, 171 N.C. App. 518, 521, 615 S.E.2d 688, 692-93 (No. COA04-821) (Filed 19 July 2005). Nevertheless, recognizing that the amendment to Rule 103 went into effect before the instant case went to trial, and that therefore defense counsel was operating under an assumption of its constitutionality, in our discretion pursuant to N.C.R. App. P. 2, we have chosen to review defendant's argument.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law."

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State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Although our case and statutory law encourages trial courts to be specific in their orders regarding suppression motions, *see, e.g., State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984) (“Findings and conclusions are required in order that there may be a meaningful appellate review of the decision.”) and N.C. Gen. Stat. § 15A-977(f) (2003) (requiring the trial court to “set forth in the record [its] findings of fact and conclusions of law” regarding a suppression motion), our Supreme Court has previously stated that “[i]f there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact In that event, the necessary findings are implied from the admission of the challenged evidence.” *State v. Vick*, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995) (citations omitted).

In the instant case, the transcript of the suppression hearing reflects that, after eliciting testimony from Sergeant Allen, the State argued that defendant had no standing to object to the initial warrantless entry of Alston’s residence, and, in the alternative, that there were sufficient exigent circumstances authorizing law enforcement officials to enter the residence. The trial court thereafter concluded that “in its discretion, [it would] deny the motion to suppress and deny the motion to throw out the search warrant and the evidence [which] relied upon information that was illegally obtained by law enforcement.” The trial court offered no reasoning for its decision at that time. In an order filed 12 April 2004, the trial court made the following findings of fact:

1. Members of the Greensboro Police Department obtained information as to a possible homicide at the residence of 1917 Drexel Road.
2. Upon arriving at said address, the residence was secure, meaning locked.
3. Officers received other information that family members had not heard from the owner of the residence, [Alston].
4. That [Alston] was the possible victim in the residence.
5. A family member was contacted in order to gain entry.
6. The family member, [Ricky], arrived at 1917 Drexel Road, and did not have a key to the residence.

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7. [Ricky] then went through a window of the residence. Once inside, [Ricky] invited members of the Greensboro Police Department inside.
8. Greensboro Police Department conducted a cursory search to see if anyone was in need of medical assistance.
9. Once inside the residence, officers observed a bedroom with possible blood stains and spatter throughout the room and walls.
10. At that point officers exited the residence to obtain a search warrant.

Based upon these findings of fact, the trial court ruled as follows:

1. [Defendant's] motion to suppress evidence illegally seized is denied.
2. [Defendant's] motion to suppress evidence obtained by virtue of a search without a warrant is denied.

As detailed above, in its order denying defendant's motion to suppress, the trial court merely summarized the evidence presented at *voir dire* and offered a blanket conclusion regarding the ultimate issue before it. Assuming *arguendo* that this was proper considering the circumstances, and even according that "great deference" given to the trial court in reaching its determination, *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619, because we conclude that the trial court's conclusions were not legally correct, we reverse. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (concluding that the trial court's determination "must be legally correct, reflecting a correct application of legal principles to the facts found.").

"[I]t is clear that 'capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.'" *State v. Boone*, 293 N.C. 702, 708, 239 S.E.2d 459, 463 (1977) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 368, 20 L. Ed. 2d 1154, 1159 (1968)). "Thus, the lack of property rights in an invaded area is not necessarily determinative of whether an individual's Fourth Amendment rights have been infringed." *State v. Alford*, 298 N.C. 465, 471, 259 S.E.2d 242, 246 (1979) (citations omitted). Instead, to assert standing and successfully challenge the legality of a search, a defendant may demonstrate

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that the search occurred in an area in which he had a reasonable expectation of privacy. *See id.*

In the instant case, defense counsel attached an affidavit to defendant's motion to suppress alleging that defendant was a "lawful resident[]" of Alston's home at the time it was searched. At the suppression hearing, Sergeant Allen admitted that when she and other law enforcement officers first arrived at Alston's residence, they "had information that [defendant] was a resident of" Alston's residence, and that either Millikan or Snipes "believed that he resided there." At trial, various witnesses described defendant as Alston's "roommate," including those law enforcement officers who entered Alston's residence and acted pursuant to similar information from informants. In light of the foregoing, we conclude that there is no issue regarding whether defendant had standing to object to the warrantless search of Alston's residence. Accordingly, to the extent that it relied upon defendant's standing in reaching its decision, we conclude that the trial court erred.

Under the general rule, prior to searching the residence of a private citizen, law enforcement officials are required to secure a warrant based upon probable cause. *See, e.g., State v. Woods*, 136 N.C. App. 386, 390, 524 S.E.2d 363, 365, *disc. review denied*, 351 N.C. 370, 543 S.E.2d 147 (2000). However, "where law enforcement officers are responding to an emergency and there is a 'compelling need for official action and no time to secure a warrant,' " exigent circumstances exist which allow the officers to enter a residence without a warrant. *Id.* at 390, 524 S.E.2d at 366 (citations omitted). Thus, "[w]here . . . officers believe that persons are on the premises in need of immediate aid, or where there is a need 'to protect or preserve life or avoid serious injury,' the Supreme Court has held that a warrantless search does not violate the Fourth Amendment." *Id.* at 390-91, 524 S.E.2d at 366 (citations omitted). In such situations, " '[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " *Mincey v. Arizona*, 437 U.S. 385, 392, 57 L. Ed. 2d 290, 300 (1978) (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)). However, where a defendant challenges the circumstances justifying a warrantless search, the burden is on the State to prove the existence of such exigent circumstances. *Woods*, 136 N.C. App. at 391, 524 S.E.2d at 366.

"Facts and circumstances sufficient to constitute 'exigent circumstances' in the context of [F]ourth [A]mendment searches vary widely and have been the subject of a significant number of cases."

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State v. Johnson, 310 N.C. 581, 586, 313 S.E.2d 580, 583 (1984) (citations omitted). “Despite the numerous fact situations giving rise to the characterization of ‘exigency,’ it appears to be the essence of ‘exigent circumstances’ that there was ‘the lack of time to obtain a warrant without thwarting the arrest or making it more dangerous. *Where time was adequate, failure to obtain a warrant should not be excused.*’ ” *Id.* (quoting Latzer, Enforcement Workshop: Police Entries to Arrest—*Payton v. New York*, 17 Crim. L. Bull. 156, 165 (1981)) (emphasis in original).

In the instant case, we are not convinced that the circumstances created an exigency requiring that law enforcement officials immediately enter Alston’s residence. At the suppression hearing, Sergeant Allen agreed that the information she had obtained was “related to [her], maybe second or third hand,” and it indicated only that “something had happened [at Alston’s residence] several days before perhaps[.]” When asked whether she could “state to the Court that there was an emergency to go in there and help someone that had been dead two to three days,” Officer Allen replied as follows:

No, sir. However, we frequently—we police officers frequently get information from citizens who express concern over the welfare of a relative or a friend and we will respond to residences. When we get this information, when it’s coming third hand or secondhand, we attempt to verify all the facts that we can, of course. And in doing so when Miss Snipes was spoken to, the officers, as they related to me, said that she had said something bad had happened, that he had possibly been killed. As an officer I can’t conclude that [] I have a victim of an assault because someone has said secondhand that that person may have been killed if they were not actually a witness to the assault that that person was actually killed. Therefore, to me, there was still the possibility that there might be someone inside the residence in need of medical attention or some sort of assistance.

Sergeant Allen later testified that she also had received “information from [Alston’s] relatives and his co-workers that he had not been seen since Thursday . . . [and] that this was unusual for him not to show up for work.” Nevertheless, as detailed above, Sergeant Allen testified at trial that the residence appeared to be secure upon her arrival, that the curtains or blinds of the residence were drawn, and that there were no cars in the driveway. She also testified that she “needed more to go on” and “didn’t know for sure” whether an assault had occurred in Alston’s residence or whether it was necessary for her to enter the

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residence. We conclude that this evidence, when viewed in its entirety, does not establish an immediate need of entry into Alston's residence. Although law enforcement officers were notified of a possible homicide, other pertinent information indicated that if a homicide had occurred, it had occurred more than two days prior to the officers' arrival at Alston's residence. Sergeant Allen and the other officers noted that Alston's residence was secure upon their arrival. After he was allowed to remove an air conditioning unit from a window of the residence in order to enter it, Ricky informed the officers that there was no one inside. At trial, Ricky testified that he, his sisters, and wife all walked through the residence prior to inviting the officers in, and that no one had seen "any bodies" in the residence. There is no indication that, had the officers left the scene in order to obtain a warrant, defendant's arrest would have been thwarted or Alston would have survived. In light of the foregoing, we conclude that the State failed to establish any exigent circumstances authorizing the officers' warrantless entry into Alston's residence. Accordingly, to the extent that the trial court relied upon exigent circumstances in reaching its decision, we conclude that the trial court erred.

We note that in its brief, the State asserts various other reasons that the trial court could have relied upon in denying defendant's motion to suppress, including that defendant had abandoned the residence and that the evidence would have been discovered inevitably. However, in *Cooke*, our Supreme Court noted that "[i]t would clearly be unfair" for an appellate court to consider on appeal those contentions not originally argued at the trial level, and the Court refused to allow the State "a gratuitous second chance" to develop new theories on remand. 306 N.C. at 136-38, 291 S.E.2d at 621. In the instant case, as there is "no affirmative indication in the record that the State intended to, or tried to, rely upon" the alleged inevitable discovery of the evidence or defendant's abandonment of the residence to defeat the motion to suppress, in light of *Cooke*, we are compelled to conclude that the State has abandoned both arguments. *Id.* at 138, 291 S.E.2d at 621-22.

It is a fundamental principle of our legal system that an individual's Fourth Amendment rights should not be violated, regardless of what charge that individual faces. Thus, even in the most grisly of cases, an individual's right to be free from illegal search and seizure must be strictly upheld. Where a trial court fails to suppress unconstitutionally seized evidence, the defendant is entitled to a new trial

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unless the State demonstrates that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2003). In the instant case, after reviewing the pertinent case law and the record of defendant's trial, we conclude that the warrantless entry of Alston's residence was impermissible under those theories advanced by the State. Because we are not persuaded that the State produced overwhelming evidence to support defendant's conviction notwithstanding that evidence thereafter seized, we reverse defendant's conviction and order a new trial.

Reversed; new trial.

Judges HUDSON and ELMORE concur.

NAOMI SINGLETARY, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA BAPTIST
HOSPITAL, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA04-1459

(Filed 18 October 2005)

1. Workers' Compensation— disability—extent—sufficiency of evidence

A workers' compensation plaintiff failed to prove disability after 2 May 2002 where her doctor wrote a note excusing her from work until 2 May, but no physician instructed her to remain out of work thereafter.

2. Workers' Compensation— disability—presumption of continuing—same award

A disability finding did not entitle a workers' compensation plaintiff to a presumption of continuing disability in the same award. Showing the existence of a disability did not relieve her from proving the extent of the disability.

3. Workers' Compensation— denial of claim—reasons valid and sufficiently detailed

Defendant provided valid reasons and sufficient details for denying a workers' compensation claim where defendant was concerned about whether plaintiff was being honest about her condition, and sought to challenge whether plaintiff had devel-

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oped fibromyalgia, and whether that condition was linked to plaintiff's accident at work.

4. Workers' Compensation— defense of claim—reasonable

Defendant-hospital's defense of a workers' compensation claim was reasonable, and the Industrial Commission did not abuse its discretion by not assessing sanctions against the defendant.

5. Workers' Compensation— causation—temporal relationship between accident and injury

The Industrial Commission's finding of causation was supported by competent record evidence where the doctor's opinion was formed by the temporal relation between the accident at work and the injury (there was no problem before the injury and there was a problem afterwards), but he also considered, tested for, and excluded other causes of her condition.

6. Workers' Compensation— disability—extent—evidence

There was competent evidence supporting the extent of a workers' compensation disability through 2 May 2002 where a doctor determined that plaintiff was unable to work and wrote a note excusing her from work until 2 May 2002.

Appeal by plaintiff and defendant from an opinion and award filed 11 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 June 2005.

Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for plaintiff appellant-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Philip J. Mohr, for defendant appellant-appellee.

McCULLOUGH, Judge.

Both parties appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission") granting workers' compensation benefits to plaintiff Naomi Singletary ("Singletary") for fibromyalgia arising from an injury sustained during her employment with defendant North Carolina Baptist Hospital ("the Hospital"). On appeal, Singletary contends that the award is insufficient, and the Hospital contends that no award should have been made at all. With respect to both appeals, we affirm.

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FACTS

On 7 October 2001, Singletary was working at defendant Hospital as a certified nursing assistant. While Singletary and a registered nurse were cleaning a very heavy patient, the registered nurse lost her grip on the patient, who fell onto Singletary's right arm and shoulder. Singletary felt a pop and immediately experienced pain in her back. Within a few hours of the incident, she sought treatment at the Hospital's emergency room. Singletary was diagnosed as having low back pain and instructed to return to work at light duty for the next three days.

On 10 October 2001, Singletary visited the Hospital's employee health services department for back pain. She was diagnosed with cervical and lumbar strain and spasm, was told not to return to work until 15 October, and was given a forty-pound lifting restriction. On 15 October 2001, Singletary returned to employee health services with complaints of back pain. She was permitted to remain out of work until 22 October. On 24 October 2001, Singletary returned to employee health services and reported that she had attempted to return to light duty two days earlier but was unable to work because of pain. Singletary was kept out of work and sent to physical therapy.

As of 16 November 2001, Singletary had shown little improvement, so employee health services referred her to an orthopedic specialist. A physician's assistant at the Hospital's orthopedics department diagnosed Singletary with mechanical low back pain and referred her to Dr. Robert Irwin. Following an examination on 17 January 2002, Dr. Irwin diagnosed Singletary as having fibromyalgia and determined that she was "not fit for any duty." Dr. Irwin drafted a note excusing Singletary from work until 2 May 2002. In a deposition submitted to the Commission, Dr. Irwin related Singletary's fibromyalgia to the 7 October 2001 incident at work.

Prior to the time when Singletary sought treatment from Dr. Irwin, the Hospital had been covering her medical expenses and compensating her for the time that she was excused from work. However, on 3 December 2001, the Hospital filed a Form 61 "Denial of Workers' Compensation Claim," pursuant to which the Hospital ceased paying compensation and medical benefits to Singletary. Pursuant to this filing, the Hospital declined to pay medical bills incurred by Singletary after her 17 January 2002 appointment with Dr. Irwin, and Singletary was unable to receive further treatment by Dr. Irwin.

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In an opinion and award filed 11 June 2004, the Commission determined that Singletary had sustained an injury by accident arising out of and in the course of her employment which caused or aggravated her fibromyalgia. The Hospital was ordered to pay temporary total disability benefits to Singletary from 7 October 2001 until 2 May 2002 and to pay past and future medical expenses related to her injury. From this opinion and award, both parties now appeal.

SINGLETARY'S APPEAL

We begin with Singletary's appeal. Singletary argues that the Commission erred by (I) determining that she failed to prove the existence of a disability, as the term is defined by the Workers' Compensation Act, after 2 May 2002, (II) failing to apply a presumption of ongoing disability, (III) determining that the Hospital had taken sufficient action to deny the compensability of her claim, and (IV) determining that the Hospital's defense of her claim was reasonable and by failing to assess sanctions.

I.

[1] We first address Singletary's argument that the Commission erred by finding and concluding that she had failed to prove that she was under a disability after 2 May 2002. This contention lacks merit.

Section 97-2(9) of the North Carolina General Statutes defines a disability to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2003). "[A] claimant ordinarily has the burden of proving both the existence of [a] disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). This Court must affirm the Commission's disability determination if (1) its findings are supported by competent record evidence and (2) its conclusions are supported by findings of fact and applicable law. *See Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (noting this Court's standard of review).

In the instant case, Dr. Irwin wrote a note excusing Singletary from work until 2 May 2002, and neither Dr. Irwin nor any other physician instructed her to remain out of work thereafter. Furthermore, the Commission was not required to find as credible any evidence that she was unable to work after 2 May 2002. *See Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002) ("[T]he Commission is the sole judge of the credibility of the wit-

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nesses and the weight accorded to their testimony.”). As such, we are unpersuaded that the Commission erred by finding and concluding that Singletary had failed to prove disability after 2 May 2002.

II.

[2] We next address Singletary’s contention that the Commission could not determine that her disability ended on 2 May 2002 because she was entitled to a presumption of continuing disability pursuant to *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). This contention lacks merit.

Under *Watkins*, once an employee proves a disability, “there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred.” *Id.* To avail herself of the *Watkins* presumption, a claimant must meet the initial burden of proving a disability in one of two ways: “(1) by a previous Industrial Commission award of continuing disability, or (2) by producing a Form 21 or Form 26 settlement agreement approved by the Industrial Commission.” *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 470, 577 S.E.2d 345, 350 (2003).

In the instant case, Singletary is unable to rely upon either a **pre-vious** opinion and award of the Commission establishing a continuing disability or a Commission-approved settlement agreement. Instead, she argues that, because the Commission’s opinion and award made a finding of disability, *Watkins* required the Commission to apply a presumption of continuing disability in the **same** opinion and award. Stated differently, it is Singletary’s contention that, once she had shown the existence of a disability, she was relieved from proving the extent of it. However, it is well established that a claimant bears the burden of proving the extent of her disability. *See, e.g., Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

This assignment of error is overruled.

III.

[3] We next address Singletary’s argument that the Commission erred by determining that the Hospital had taken sufficient action to deny the compensability of her claim. Singletary admits that the Hospital intended to deny her claim, but she insists that its filing failed to provide the statutorily required statement of the grounds for denying compensability. This contention lacks merit.

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Section 97-18(d) of the North Carolina General Statutes establishes a procedure pursuant to which an employer that is “uncertain on reasonable grounds whether [a] claim is compensable or whether it has liability” may initiate payment of benefits to an employee without accepting liability if a denial is ultimately filed within ninety days. N.C. Gen. Stat. § 97-18(d) (2003). The statute further provides that

[i]f at any time during the [prescribed] period . . . , the employer . . . contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer . . . must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim

Id.

In the instant case, the Hospital initially paid benefits to Singletary. However, approximately two months after Singletary's accident at work, the Hospital filed a Form 61 “Denial of Workers' Compensation Claim,” in which it provided the following reasons for denying her claim:

- 1) [Singletary's] disability is not the result of an accident or specific traumatic incident occurring on the job.
- 2) [Singletary] is not currently disabled.
- 3) Credibility.

Singletary insists that the proffered denial was insufficiently detailed and did not state any actual reasons for denying compensability and liability. However, even a cursory review of the reasons listed on the Form 61 reveals that the Hospital was concerned about whether Singletary was being honest about her condition and that it sought to challenge whether Singletary had, in fact, developed fibromyalgia and, if so, whether the condition was linked to her accident at work. Accordingly, we conclude that the Commission properly determined that the Hospital had provided valid reasons for

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denying Singletary's claim and had provided sufficient detail in its statement of such reasons.

This assignment of error is overruled.

IV.

[4] We next address Singletary's argument that the Commission erred by determining that the Hospital's defense of her claim was reasonable and by failing to assess sanctions against the Hospital. We disagree.

"If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2003). The decision of whether to take such action is consigned to the discretion of the Commission, and will be left undisturbed absent an abuse of discretion. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 398, 298 S.E.2d 681, 685 (1983).

Given the facts and circumstances of the instant case, we are unpersuaded that the Hospital's defense of Singletary's claims was necessarily unreasonable. Further, we discern no abuse of discretion in the Commission's decision not to impose sanctions.

This assignment of error is overruled.

THE HOSPITAL'S APPEAL

We turn now to the Hospital's appeal. The Hospital argues that the Commission erred by (I) determining that Singletary's fibromyalgia was caused by her 7 October 2001 accident at work, and (II) determining that Singletary was entitled to benefits through 2 May 2002.

I.

[5] We first address the Hospital's argument that the Commission erred by finding that Singletary's fibromyalgia was caused by the 7 October 2001 accident at work. The Hospital insists that Dr. Irwin's testimony was insufficient to establish such a causal nexus because it was based solely upon the temporal relationship between the accident and the development of Singletary's fibromyalgia and was, therefore, speculative. We disagree.

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This Court must affirm findings of the Industrial Commission that are supported by competent evidence in the record. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). Where the link between a plaintiff's condition and an accident at work involves a complex medical question, as in the instant case, a finding of causation must be premised upon the testimony of a medical expert. *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). Thus, "'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). Accordingly, if an expert's opinion as to causation is wholly premised on the notion of *post hoc ergo propter hoc* (after it, therefore because of it), then the expert has not provided competent record evidence of causation. *Id.* at 232-33, 538 S.E.2d at 916.

For example, in *Young*, the Industrial Commission found that a claimant's fibromyalgia had been caused by an accident at work based solely on the opinion testimony of a Dr. Payne, who stated that "I think that [the claimant] does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's the **only** piece of information that relates the two." *Id.* at 232, 538 S.E.2d at 916 (emphasis added). Our Supreme Court held that the Commission could not make a finding of causation based only upon this opinion because the opinion was premised entirely on Dr. Payne's application of *post hoc ergo propter hoc*. *Id.* The Court added:

The speculative nature of Dr. Payne's expert opinion is reflected in his testimony that while he acknowledged that he knew of several other potential causes of Ms. Young's fibromyalgia, he did not pursue any testing to determine if they were, in fact, the cause of her symptoms. For instance, Dr. Payne conceded that he was aware of osteoarthritis in Ms. Young and that her sister was diagnosed with rheumatoid arthritis. However, when asked on cross-examination whether he had performed any tests to rule out other forms of rheumatoid disease or illness that could account for Ms. Young's symptoms, Dr. Payne testified that he had not. Indeed, when asked by defense counsel whether those tests had been conducted, Dr. Payne simply responded, "[T]hose studies

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need to have been done.” Additionally, in response to defense counsel’s questions about other potential causes of Ms. Young’s symptoms, Dr. Payne admitted that he did not attempt to ascertain whether plaintiff suffered from any viral or bacterial illnesses during the time between her injury and his diagnosis of fibromyalgia. This response followed the doctor’s acknowledgment of case reports suggesting that fibromyalgia could be associated with a postbacterial illness reaction or a postviral reaction.

The speculative nature of the doctor’s opinion is further reflected in his testimony regarding Ms. Young’s gallbladder surgery in 1994. Plaintiff’s surgery took place two years after her injury and seven months before her first visit with Dr. Payne. On cross-examination, the doctor acknowledged that surgery is an “event that is thought to trigger or aggravate fibromyalgia,” and that, depending on how well Ms. Young tolerated her gallbladder surgery, it “could have aggravated [plaintiff’s] fibromyalgia.” The record therefore supports, through Dr. Payne’s own admissions, at least three potential causes of fibromyalgia in Ms. Young other than her injury in 1992.

Id. at 232-33, 538 S.E.2d at 915-16.

The instant case is distinguishable from *Young*. It is true that Dr. Irwin’s opinion on causation was informed by the temporal relation between Singletary’s accident at work and her illness: “[S]he did not have a problem before the injury. Then starting from the injury, she had the problem and based on what I know as a result of that, I would say that, yes, they are related.” However, Dr. Irwin also identified other potential causes of Singletary’s fibromyalgia, and rejected them. For example, during his 17 January 2002 examination of Singletary, Dr. Irwin noted that Singletary had diabetes, and he tested her for diabetic peripheral neuropathy, another condition which may have produced her symptoms. The testing indicated that Singletary was not suffering from diabetic peripheral neuropathy. Likewise, in his deposition testimony, Dr. Irwin expressed an opinion that, notwithstanding Singletary’s pre-existing sleep apnea and diabetes, her 7 October 2001 accident at work played a role in the development of her fibromyalgia:

[SINGLETARY’S ATTORNEY]: If we assume that Ms. Singletary had been having sleep apnea, for example, that might be indicative of fibromyalgia or associated with the causal complex and other problems before October of 2001, but then she did have the

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injury that's described in the Employee Health notes that you saw . . . would it be your opinion that there was any contribution of the pre-existing condition to the condition for which you saw her in January of 2002 or would it be separate?

[DR. IRWIN]: [Singletary's] sleep apnea certainly could [have] contribute[d] to it and [her] diabetes certainly could [have] as well.

[SINGLETARY'S ATTORNEY]: Okay. In your opinion, judging from what you see with the notes, would they likely have caused any disabling fibromyalgia in the absence of the injury she had in October [2001]?

[DR. IRWIN]: Sleep apnea can cause disabling fibromyalgia on its own.

[SINGLETARY'S ATTORNEY]: In her case, did it, in your opinion?

[DR. IRWIN]: Since she didn't have pain prior to the injury, I would say it didn't.

[SINGLETARY'S ATTORNEY]: Okay. If she had some pain prior to the injury but not as much as she had after the injury, can trauma aggravate a person's pre-existing fibromyalgia or activate a pre-existing predisposition toward it?

[DR. IRWIN]: Yes.

[SINGLETARY'S ATTORNEY]: In her case, if she did have some level of pain that allowed her to work and was of a much lesser nature than what she had afterwards and then she had this injury and then had the condition that you've been able to observe through the records and also through your own observations, would it be a fair characterization to say that her condition was aggravated by the injury[?]

[DR. IRWIN]: Yes.

Thus, Dr. Irwin's causation testimony was not mere speculation and was not entirely premised on the temporal relationship between Singletary's injury at work and her development of fibromyalgia. Rather, although this temporal relationship played a role in the diagnosis, Dr. Irwin also considered, tested for, and excluded other causes of her condition. Therefore, the Commission's finding of cau-

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sation, which was based upon Dr. Irwin's testimony, is supported by competent record evidence and must be affirmed.

This assignment of error is overruled.

II.

[6] The Hospital next contends that the Commission erred by awarding benefits to Singletary through 2 May 2002 because she failed to prove the extent of her disability. However, the record establishes that Dr. Irwin determined that Singletary was unable to work and that he wrote a note excusing her from work until 2 May 2002. As such, there is competent evidence to support the Commission's finding concerning the extent of Singletary's disability. This assignment of error is overruled.

For the foregoing reasons, the Commission's opinion and award is

Affirmed.

Judges TYSON and BRYANT concur.

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No. COA04-615

(Filed 18 October 2005)

1. Child Abuse and Neglect— guardianship—action by parent to regain custody—standard for hearing

The trial court applied an incorrect standard to a parent's hearing to regain custody of her child, who had been placed in the guardianship of grandparents. The court applied N.C.G.S. § 7B-600(b), which placed the burden on the parent to show that the guardianship should be terminated, but the court had never held a permanency planning hearing for the guardianship pursuant to N.C.G.S. § 7B-907.

2. Child Abuse and Neglect— child welfare reviews—procedure—not frozen at first petition

N.C.G.S. § 7B-600(b), and the relevant amended portion of 7B-906(b), apply to child welfare reviews commenced after 1 October 2000, including this action. Even though the current ver-

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sion of the statutory scheme was not the law when the child was placed under the care of guardians, the operative effect of these two statutes is procedural and does not alter the legal consequences of conduct completed prior to their enactment. Freezing the governing procedure in child welfare cases when the first petition is filed would create an unworkable system, given the longevity and fluidity of custody proceedings.

Appeal by respondent from order entered on 2 December 2003 by Judge Lisa V.L. Menefee, in District Court in Forsyth County. Heard in the Court of Appeals 1 March 2005.

Theresa A. Boucher, for Forsyth County Department of Social Services.

Jonathan Leonard, for the guardians of the minor child.

Womble, Carlyle Sandridge & Rice, by John Still, for Guardian ad Litem.

Lisa S. Costner, for respondent.

HUDSON, Judge.

On 23 May 2003, Respondent moved to regain legal and physical custody of her minor child, J.D.C., who was in legal custody of the Forsyth County Department of Social Services (“DSS”) and under the guardianship of J.D.C.’s grandparents, Perry and Judy Smith. The Smiths filed a response and motion to dismiss. On 2 December 2003, Judge Lisa V.L. Menefee ordered that legal custody and guardianship of J.D.C. remain with the Smiths. Respondent appeals. For the reasons discussed below, we reverse and remand.

On 9 April 1999, DSS filed a petition alleging that J.D.C., then three months old, was a neglected juvenile. DSS removed J.D.C. from the home the same day. J.D.C.’s father, Daniel Clifton, had been convicted of felony child abuse of another infant son in 1996 and served eighteen months in prison for this offense. DSS also received a report that Mr. Clifton sexually abused his seven-year-old step-sister; he was convicted of First Degree Rape in 2000 and received a twenty-six year prison sentence. Respondent lived with her infant son, J.D.C., and Mr. Clifton at the time of the DSS investigation and removal.

On 12 April 1999, the court held a non-secure custody hearing, attended by both Mr. and Mrs. Clifton. At a second non-secure cus-

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tody hearing on 13 May 1999, the court placed J.D.C. in the custody of his grandmother, Judy Smith. In June 1999 the court adjudicated J.D.C. a neglected juvenile and held a dispositional hearing pursuant to N.C. Gen. Stat. § 7A-640 (1999), continuing legal custody of J.D.C. with DSS and placement with the Smiths. The court ordered Respondent to complete certain services to facilitate reunification with J.D.C. In September 1999, a periodic review hearing was held pursuant N.C. Gen. Stat. § 7B-906 and the court granted legal guardianship and custody of J.D.C. to his grandparents, the Smiths. The court held two more periodic reviews in 2000, each time continuing guardianship and custody with the Smiths, as well as delineating what the Respondent needed to do in order to regain custody. At the 17 May 2000 review, the court ordered that there be no further reviews in this case.

In May 2002, Respondent filed a motion for review requesting custody of J.D.C. She filed subsequent motions in August 2002 and May 2003, all requesting return of custody of her son, based upon her compliance with previous reunification requirements ordered by the court and upon changed circumstances. The court heard arguments regarding what standard of proof would be applied at the hearing and decided that pursuant to N.C. Gen. Stat. § 7B-600(b) (2002), “[t]he Court specifically finds that it shall be [Respondent’s] burden to show that continued legal guardianship of [J.D.C.] with Perry and Judy Smith is not in the child’s best interest.” The case was subsequently continued and Respondent filed an amended motion in the cause where she challenged the applicability of N.C. Gen. Stat. § 600(b). However, on 29 October 2003, in the hearing on the motion for custody, the court did apply this standard, requiring Respondent to show that the relationship between the guardians and J.D.C. was no longer in the best interest of the child, or that the guardians were unwilling, unable or unfit, or that they had neglected their duties as guardians. The court found that Respondent failed to make such a showing and dismissed her motion.

[1] Respondent argues that the trial court applied the incorrect standard at the hearing on her motion. Because this is a question of law, we review it *de novo*. See *Mohr v. Mohr*, 155 N.C. App. 421, 423, 573 S.E.2d 729, 731 (2002). As mentioned, the court conducted the hearing pursuant to N.C. Gen. Stat. § 7B-600(b). N.C. Gen. Stat. § 7B-600, entitled “Appointment of guardian” confers power on the court to appoint a guardian of the person for the juvenile, to be supervised by the court, when “no parent appears in a hearing with the

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juvenile or when the court finds it would be in the best interests of the juvenile.” N.C. Gen. Stat. § 7B-600(a) (2002). Subsection (a) also defines the scope of the guardian’s authority and states that such authority will continue “until the guardianship is terminated by court order, until the juvenile is emancipated . . . or until the juvenile reaches the age of majority.” *Id.* Subsection (b) governs termination of the guardianship as follows:

In any case where the court has determined that the appointment of a relative or other suitable person as guardian of the person for a juvenile is in the best interest of the juvenile and *has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile*, the court may not terminate the guardianship or order that the juvenile be reintegrated into a parent’s home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile’s best interest, that the guardian is unfit, that the guardian has neglected a guardian’s duties, or that the guardian is unwilling or unable to continue assuming a guardian’s duties.

N.C. Gen. Stat. § 7B-600(b) (emphasis added). Thus, in applying section 7B-600(b) here, the court placed the burden of proof on Respondent to show that the guardianship should be terminated and it refused to hear evidence regarding her fitness as a parent or whether reunification was in the best interest of J.D.C. Respondent asserts that application of this standard was erroneous because no findings that guardianship was the permanent plan for J.D.C. had been made pursuant to N.C. Gen. Stat. § 7B-907. We agree.

The record reflects multiple orders continuing guardianship of J.D.C. with the Smiths, pursuant to N.C. Gen. Stat. § 7B-906. N.C. Gen. Stat. § 7B-906 (2002), entitled “Review of custody order,” states in pertinent part that:

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter. . . .

Id. N.C. Gen. Stat. § 7B-906(b) states that “[t]he court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review.” *Id.* This provision allows parents to seek review, as Respondent did here. It also requires that where the child has an

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appointed guardian *and* “the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).” *Id.* N.C. Gen. Stat. § 7B-907 (2002), on the other hand, governs “permanency planning hearings,” and requires that:

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing *designated as a permanency planning hearing* within 12 months after the date of the initial order removing custody, and the *hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906*. The purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.

Id. (emphasis added).

While hearings under sections 7B-906 and 7B-907 have many similarities, they remain separate and distinct statutory requirements, and one cannot suffice for the other. *See In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005); *In re B.N.H.*, 170 N.C. App. 157, *disc. review denied*, 359 N.C. 632, 615 S.E.2d 865 (2005); *In re Harton*, 156 N.C. App. 655, 577 S.E.2d 334 (2003). Our juvenile code balances the important, and sometimes competing interests of family reunification, permanency for the child, and the best interest of the child. *See* N.C. Gen. Stat. § 7B-100; *R.T.W.*, 359 N.C. at 543, 614 S.E.2d at 492. “The permanency planning process in Article 9 is meant to bring about a definitive placement plan for the abused, neglected, or dependent child.” *R.T.W.*, 359 N.C. at 546, 614 S.E.2d at 494. On the other hand,

[i]t is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s).

In re Shue, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984) (interpreting former N.C. Gen. Stat. § 7A-657, which governed review of custody orders prior to the 1999 recodification of the Juvenile Code).

Here, the record indicates that the court held multiple review hearings pursuant to section 7B-906, but never held a hearing pur-

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suant to section 7B-907. Although the court may have intended to combine the permanency planning and review hearings, as allowed by section 7B-907, our review of the record indicates that all hearings were designated in the court orders as periodic review hearings, pursuant to section 7B-906(a). Moreover, our careful review of the record reveals that the court never made a finding that guardianship was the permanent plan for J.D.C., as required by §§ 7B-906(b) and 7B-600(b). Indeed, in the record there are no findings regarding permanency, no orders relieving DSS of reunification efforts, and in each order the court sets forth requirements for Respondent's reunification with J.D.C. Thus, we hold that the court erred here in applying N.C. Gen. Stat. § 7B-600(b) and imposing the burden of proof on Respondent.

The North Carolina Supreme Court has held that the burden of proof in a review hearing does not rest on a parent trying to regain custody. *Shue*, 311 N.C. at 595-96, 319 S.E.2d at 573. In *Shue*, the mother sought to regain custody of her child after the court had removed the child and granted permanent custody to the father. *Id.* at 590, 319 S.E.2d at 570. The review hearing in *Shue* took place pursuant to the former N.C. Gen. Stat. § 7A-657, which governed review of custody orders prior to the 1999 recodification of the Juvenile Code. In *Shue*, the Court held that § 7A-657 did not place any burden of proof upon the mother and that the trial court thus erred. *Id.* at 597, 319 S.E.2d at 573-74. The Court noted that section 7A-657

contemplates that a child *may* be returned to the parent(s) from whose custody it was taken if the trial court finds sufficient facts to show that the child will receive proper care and supervision from the parent(s). However, before the custody is restored to that parent, the trial court also must find that such placement . . . is deemed to be in the best interest of the [child].

Id. at 596, 319 S.E.2d at 573 (emphasis and alterations in original).

At the time *Shue* was decided the requirements of section 7B-600(b) did not exist; however, we find *Shue* instructive where the court conducts a 7B-906(b) review and 7B-600(b) is not applicable. In enacting section 7B-600(b), we believe that the legislature intended to balance the goal of family reunification, with permanency, another important goal of the Juvenile Code. Thus, it places the burden of proof on a parent seeking review where guardianship is the permanent plan, so as not to disrupt the child's permanency, but

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not where the court has yet to set guardianship as the permanent plan. We hold that where there has been no finding that guardianship is the permanent plan, pursuant to N.C. Gen. Stat. § 7B-907, section 7B-600(b) is inapplicable, and the court may not impose the burden of proof upon the parent.

In *Shue*, the Court opined that the intent of the statute was that evidence be presented to the trial court so that it could determine what was in the best interest of the minor. *Id.* The Court then held that the trial court should have heard evidence that the mother intended to present, because evidence determinative of the minor's best interest was critical. *Id.* at 597-98, 319 S.E.2d at 574. Similarly, we conclude that here the court should have conducted the hearing to

consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid in its review . . . to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-906(c) (2002).

[2] Appellees argue that the requirement of a finding of guardianship as the permanent plan pursuant to § 7B-907 was not required here, as § 7B-600(b) was not the law when J.D.C. was placed under the care of guardians. The current version of the statute became effective 1 October 2000. The previous version of the statute, N.C. Gen. Stat. § 7B-600, which was in effect when J.D.C. was first adjudicated in 1999, did not include subsection (b) or the requirement that the court have made a finding that guardianship was the permanent plan pursuant to section 7B-907. However, we conclude that N.C. Gen. Stat. § 7B-600(b) was in effect at the time of the 2002 hearing here.

Appellees argue that the law in effect when the child was removed from his home should continue to apply to any related proceedings, but do not cite any law supporting this contention. "The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). Generally, "statutes or amendments pertaining to procedure are usually held to

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operate retrospectively, absent a clear expression of legislative intent to the contrary.” *Id.* at 718, 268 S.E.2d at 470. Here, we conclude that the operative effect of N.C. Gen. Stat. § 7B-600(b), and the amended portion of § 7B-906(b) which refers to § 7B-600(b), do not alter the legal consequences of conduct completed prior to their enactment, rather they are procedural in nature.

Furthermore, although the legislature did not explicitly state whether the provisions at issue here applied to reviews of cases opened prior to the effective date of the amendments, we conclude that any other interpretation would contravene the intent of the Juvenile Code.

The General Assembly’s explicit desire to preserve parent-child relationships and protect children explains the fluidity of child custody proceedings These proceedings afford the trial court multiple opportunities to consider and reconsider whether a child is abused, neglected, or dependent, and if so, who should have custody. They also give parents time to correct the deficiencies that led to the child’s removal. Essentially, there is no such thing as a ‘final’ custody order, only the most recent one.

R.T.W., 359 N.C. at 545, 614 S.E.2d at 493. If the laws governing procedure in child welfare cases were frozen in time when the first petition was filed, this would create an unworkable system given the longevity and fluidity of custody proceedings. When the Juvenile Code was reformed and recodified in 1999, the changes were applicable to abuse, neglect, and dependency reports, petitions, and reviews commenced on or after the effective date of the new statutes. 1999 N.C. Sess. Laws 202. We hold that the same applies here and that the amended N.C. Gen. Stat. §§ 7B-906(b) and 7B-600(b) thus apply to any reviews commenced after 1 October 2000. Here, the review in question was held in October 2002.

Reversed and Remanded.

Judges WYNN and STEELMAN concur.

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STATE OF NORTH CAROLINA v. WILLIE ODELL WHITEHEAD, JR.

No. COA04-1238

(Filed 18 October 2005)

Sentencing— aggravating factor—failure to submit to jury

The trial court erred in imposing an aggravated sentence for robbery with a dangerous weapon based upon the court's finding an aggravating factor not admitted by defendant nor found by a jury beyond a reasonable doubt, and the case is remanded for a new sentencing hearing.

Judge TIMMONS-GOODSON concurring in a separate opinion.

Appeal by defendant from judgment entered 4 May 2004 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 22 April 2005.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Geoffrey W. Hosford for defendant-appellant.

STEELMAN, Judge.

On 26 October 2003, at approximately 1:30 am, defendant and four other males attacked William C. McKlemurry (victim) on the campus of East Carolina University for the purpose of robbing him. One of the perpetrators with defendant pulled out a gun and demanded the victim's money. The victim said "no," whereupon defendant began to push and punch the victim. Defendant took the victim's cell phone and broke it, and then took his wallet from his pocket and removed \$26.00. The perpetrators then fled the scene, but were subsequently arrested. The incident was captured on videotape by a surveillance camera belonging to the East Carolina Police Department.

Defendant was indicted 9 February 2004 for robbery with a dangerous weapon and possession of a weapon on educational property. Defendant and the State reached a plea arrangement whereby defendant pled guilty to the charge of robbery with a dangerous weapon in exchange for dismissal of the charge of possession of a weapon on educational property.

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Defendant accepted the plea agreement in open court on 4 May 2004. Both the State and the defendant were heard on sentencing factors. The trial court found as a mitigating factor that defendant's age or immaturity at the time of the commission of the offense significantly reduced his culpability. As an aggravating factor the trial court found that the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. Finding that the aggravating factor outweighed the mitigating factor, the trial court sentenced defendant to an aggravated range sentence of 80 to 105 months imprisonment. From this sentence defendant appeals.

In defendant's sole assignment of error he argues the trial court erred in finding an aggravating factor not admitted by defendant nor found by a jury beyond a reasonable doubt. We agree.

The United States Supreme Court case of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) held that a jury must find aggravating factors that would increase a defendant's sentence above that authorized by a finding that a defendant was guilty of the offense. This ruling was applied to North Carolina's Structured Sentencing of Persons Convicted of Crimes (Article 81B of Chapter 15A of the General Statutes) by the North Carolina Supreme Court in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). Both *Blakely* and *Allen* provide that "the judge may still sentence a defendant in the aggravated range based upon the defendant's admission to an aggravating factor enumerated in N.C.G.S. § 15A-1340.16(d)." *Allen*, 359 N.C. at 439, 615 S.E.2d at 265.

Since a jury did not find any aggravating factors in this case, the resolution of this appeal hinges upon whether the defendant made admissions to the trial court of the aggravating sentencing factor found by the trial court.

The trial court found only one aggravating factor, that "[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2). The State asserts that defendant, through his counsel, admitted to all of the essential elements of the aggravating factor found at N.C. Gen. Stat. § 15A-1340.16(d)(2) under the rationale of *State v. Mullican*, 329 N.C. 683, 406 S.E.2d 854 (1991). See also *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005).

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However, the identical issue presented in this case was decided by this court in favor of defendant in *State v. Meynardie*, 172 N.C. App. 127, 616 S.E.2d 21 (2005) and *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (2005). This panel is bound by these decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

This case is reversed and remanded for a new sentencing hearing.

REVERSED AND REMANDED.

Judge McCULLOUGH concurs.

Judge TIMMONS-GOODSON concurs in a separate opinion.

TIMMONS-GOODSON, Judge, concurring.

I concur in the result reached by the majority. However, I write separately to distinguish my reasoning in concluding that defendant is entitled to a new sentencing hearing.

As detailed by the majority, the record in the instant case indicates that defendant accepted the plea agreement offered by the State in open court. Following the State's recitation of the factual basis for his plea, defense counsel informed the trial court that defendant was fifteen years old at the time of the offense, has a full-scale IQ of 68, and has been diagnosed as "having mild mental retardation and cannabis abuse and adolescent antisocial behavior." Defense counsel thereafter requested that the trial court find as mitigating factors that defendant has a mental condition insufficient to constitute a defense but significant enough to reduce culpability and that defendant's age and maturity at the time of the commission of the offense significantly reduced his culpability. Defense counsel also requested that the trial court find that defendant "wasn't the ringleader, and . . . was high at the time that they were doing this." The State requested that the trial court find as an aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

The trial court agreed with the State, thereafter finding as an aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. As a mitigating factor, the trial court found that defendant's age or immaturity at the time of the commission of the offense significantly reduced his culpability. After concluding

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that the aggravating factor outweighed the mitigating factor, the trial court sentenced defendant to eighty to 105 months imprisonment, a term within the aggravated range specified by N.C. Gen. Stat. § 15A-1340.17. On appeal, defendant argues that the trial court was prohibited from sentencing him in the aggravated range without first submitting the aggravating factor to a jury for proof beyond a reasonable doubt. The State contends that defendant stipulated to the presence of the aggravating factor by accepting the State's recitation of the facts and by impliedly admitting to its presence during the sentencing hearing. In light of our Supreme Court's recent decision in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), and other pertinent case law, I agree with defendant.¹

In *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961), our Supreme Court noted that “ ‘[w]hile a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.’ ” (quoting 83 C.J.S., Stipulations, § 24b(3)). In that case, the Court held that the purported stipulation “was not definite and certain” and that the trial court “inadvertently fell into error by not insisting upon a full, complete, definite and solemn admission and stipulation” where, when the prosecutor stated the defendant's record, the defendant remained silent and the prosecutor “did not state that [the] defendant admitted the truth of the matters contained in the . . . record or that [the] defendant stipulated that he was the person referred to in the record.” *Powell*, 254 N.C. at 234-35, 118 S.E.2d at 620.

Although it has been distinguished by this Court, *see, e.g., State v. Curtis*, 73 N.C. App. 248, 326 S.E.2d 90 (1985) and *State v. Fountain*, 13 N.C. App. 107, 185 S.E.2d 284 (1971), *cert. denied*, 280 N.C. 303, 186 S.E.2d 513 (1972), *Powell* has not been overruled by our Supreme Court. Nevertheless, in *State v. Mullican*, 329 N.C. 683, 686, 406 S.E.2d 854, 855-56 (1991), the Court concluded that a defendant may

1. I note that the State argues that because defendant failed to object at sentencing, *Allen* is inapplicable to the instant case. However, in *Allen*, the Court stated that its holding would “apply to cases ‘in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.’ ” 359 N.C. at 427, 615 S.E.2d at 258 (citations omitted). Furthermore, I also note that N.C. Gen. Stat. § 15A-1446(d)(18) and (19) (2003) allow a defendant to challenge his or her sentence on appeal without prior objection where the sentence was unauthorized when imposed, otherwise invalid as a matter of law, or is effected by a significant change in the law which applies to the underlying proceedings.

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stipulate to the presence of an aggravating factor where the defendant does not object during the State's summary of the evidence and his counsel thereafter makes a statement consistent with the State's summary. In that case, the Court held that the defendant stipulated that he took advantage of a position of trust in committing first-degree sexual assault where, following the State's recitation of the evidence against him, the defendant's counsel stated that "evidently [the defendant] lived there with his mother and [his] sister [would] leave her child there . . . [a]nd his mother might go and see some neighbors and come back later . . . and it was pretty much evident that he was stuck with care of the child." *Id.* at 684, 406 S.E.2d at 855. The Court noted that the defendant had an "invitation" to object to the State's summary of the evidence and chose not to do so, that his counsel's statement was "consistent" with the State's summary of the evidence, and that his counsel concluded his statement by saying, "[o]f course that is not any excuse for [the defendant's] doing this." *Id.* at 685, 406 S.E.2d at 855.

This Court has relied upon *Mullican* and its reasoning in holding that a defendant may impliedly stipulate to the presence of aggravating factors during sentencing. *See, e.g., State v. Sammartino*, 120 N.C. App. 597, 601, 463 S.E.2d 307, 310-11 (1995) ("The recitation of the factual basis and the statements of [the] defendants show that [the] defendants destroyed a monument erected to the memory of slain police officers during the trial of the slayer of two police officers in an effort to 'make the news.' We hold that there was sufficient evidence presented to support the nonstatutory aggravating factor that [the] defendants' 'conduct was intended to show disrespect to law enforcement [in a] manner calculated to be highly publicized.'"); *State v. Murphy*, 152 N.C. App. 335, 340 n.5, 567 S.E.2d 442, 446 n.5 ("When a defendant pleads guilty, the trial court may rely upon the circumstances surrounding the offense, including factual allegations in the indictment, in determining whether aggravating factors exist.") (citing *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985); *Sammartino, supra*; *State v. Flowe*, 107 N.C. App. 468, 420 S.E.2d 475 (1992)), *disc. review denied*, 356 N.C. 442, 573 S.E.2d 161 (2002). In the instant case, although I recognize that defendant pled guilty to the offense of armed robbery and did not object to the State's summary of the factual basis for his plea, I am not convinced that the circumstances and implications surrounding defendant's plea cure the trial court's failure to submit the aggravating factor to a jury for proof beyond a reasonable doubt.

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Our Supreme Court recently examined the constitutionality of this state's structured sentencing scheme in *Allen*. After reviewing the pertinent case law, including the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), the Court concluded that, when "[a]ppplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 264-65 (citing *Blakely*, 542 U.S. at —, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.14, 15A-1340.16, 15A-1340.17).

In the instant case, the trial court enhanced defendant's sentence based upon a unilateral finding that defendant joined with more than one person to commit the offense and was not charged with a conspiracy. In support of its contention that defendant stipulated to the presence of this aggravating factor, the State relies upon the Assistant District Attorney's description of the offense and recitation of the procedural history of the case, as well as defense counsel's statements that McKlemurry was "converged on from different directions[,] " that defendant "knew they were going to rob him[,] " that "none of them knew . . . that it was on videotape[,] " that defendant "knew they were coming here to do this in Greenville, this group from Pinetops[,] " and that "there was one other juvenile, but the rest of these people were older, and . . . [defendant] followed the leader." The State also relies upon defendant's statement to the trial court that "we asked for the money and he said no, so I went over there and hit him." However, after reviewing the record in the instant case, I am unable to conclude that any of these statements represents the " 'definite and certain' " stipulation required by *Powell*. 254 N.C. at 234, 118 S.E.2d at 619. Defense counsel's statements were made following his request "just . . . to be heard . . . for sentencing." Defendant's statements were made after he was asked what he "ha[d] to say about it[.]" I am not convinced that any of these statements were offered as an express stipulation, and I note the lack of any such finding by the trial court.

Furthermore, I am also unconvinced that the circumstances of the instant case require us to find an implied stipulation by defendant. I recognize that "under *Blakely* the judge may still sentence a defend-

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ant in the aggravated range based upon the defendant's *admission* to an aggravating factor enumerated in N.C.G.S. § 15A-1340.16(d)." *Allen*, 359 N.C. at 439, 615 S.E.2d at 265 (emphasis added). However, I also recognize that in *Allen*, the Court examined the inherent prejudice associated with *Blakely*-related Sixth Amendment violations, and it refused to apply the harmless error doctrine to these "structural" errors, noting that "'speculat[ion] on what juries would have done if they had been asked to find different facts' is impermissible" when reviewing *Blakely* Sixth Amendment violations. *Id.* at 448, 615 S.E.2d at 271 (quoting *State v. Hughes*, 154 Wash. 2d 118, 148, 110 P.3d 192, 208 (2005)). This reverence for the defendant's fundamental right to a jury trial and to have aggravating factors submitted to a jury leads me to conclude that a defendant's stipulation to the presence of an aggravating factor must be unequivocally specific and not drawn from an after-the-fact implication based upon the circumstances. Indeed, the best practice would be for the trial court to obtain an express stipulation from the defendant regarding the presence of aggravating factors, whereby a reviewing court need not examine the adequacy and implication of statements contained in the transcript. Having determined that no such stipulation exists in the instant case, I agree that defendant is entitled to a new sentencing hearing. Accordingly, I also vote to remand the case to the trial court.

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ROBERT LOUIS ARMSTRONG, AND WIFE, VIVIAN B. ARMSTRONG; L.A. MOORE, AND WIFE, E. ANN MOORE; AND WILLIAM B. CLORE, AND WIFE, RAE H. CLORE, PETITIONERS V. THE LEDGES HOMEOWNERS ASSOCIATION, INC. AND THE OWNERS OF LOTS IN THE LEDGES OF HIDDEN HILLS SUBDIVISION: VIOLET M. MYERS, C. DONALD LARSSON/TRUSTEE, MARILYN BARNWELL, CHARLES S. AND CATHRYN A. HARRELL, THOMAS REIN LUGUS, JACK H. AND ROBERTA M. CRABTREE, DOROTHY LOIS SHIMON, TRUST, WILLIAM V. AND JOANN K. PHILLIPS, RICHARD AND ELIZABETH C. COOMBES, GUIDO D. AND EILEEN J. MIGIANO, EUGENE M. AND LUCRETIA B. WAGNER, JACQUELINE W. EADIE, ELIZABETH H. SCHAD, TRUST, SUNNIE TAYLOR, SUE EDELL AND T. HILLIARD STATON, ALBERT W. AND URSULA K. JENRETTE, THERESA M. WUTTKE, JOHN FITZGERALD AND ROBIN RENEE HOLSHUE, ADRIAN R. AND MARILYN B. ADES, LINDA N. ROSS, J.D. AND EDWINA S. MILLER, RUSSELL L. AND LAUNA L. SHOEMAKER, PAUL E. AND DEBORAH H. PARKER, WILLIAM SCOTT AND ELIZABETH A. CHOVAN, DAVID N. AND MELANIE D. HUTTO, TEDD M. AND JEANNIE PEARCE, TERESA M. WUTTKE, JIMMIE J. AND BETTY J. REMLEY, TERRY N. AND MICHELLE L. McADOO, JOSEPH A. AND MARGARET K. DINKINS, CARLTON W. AND FRANCES A. DENCE, CLIFTON F. AND DONNA GRUBBS SAPP, MARVIN G. AND E. JOYCE KATZ, JOY N. PARISIEN, LEWIS EDWIN AND HELEN BOOKMAN, AND DENNIS R. AND DONDRA C. SETSER, RESPONDENTS

No. COA05-88

(Filed 18 October 2005)

1. Deeds— restrictive covenants—homeowners association bylaws—alteration

The trial court did not err by denying injunctive relief to homeowners who sought to have amended homeowners association bylaws declared void. Alteration of the terms of the declaration by majority vote of the lot owners was intended by the developer and expressly allowed by the declaration of restrictive covenants.

2. Deeds— restrictive covenants—amendments

Amended restrictive covenants that included automatic membership in the homeowners association and the collection and enforcement of assessments were adopted and enacted by the property owners in conformity with a uniform plan of development and express powers set out in the covenants, and the trial court did not err by refusing injunctive relief. Petitioners accepted their deeds with the knowledge that the restrictive covenants could be amended in the future.

3. Deeds— planned community—Act not referenced

It was not necessary in a case involving homeowners association membership and assessments to determine whether a

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subdivision was a planned community under the Planned Community Act. That Act was not referred to or adopted by either the current bylaws of the homeowners association or the amended restrictive covenants.

Appeal by petitioners from judgment entered 20 October 2004 by Judge J. Marlene Hyatt in Henderson County Superior Court. Heard in the Court of Appeals 14 September 2004.

Kennedy Covington Lobdell & Hickman, by Roy H. Michaux, Jr., for petitioners-appellants.

Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A., by Ted F. Mitchell, for respondent-appellee The Ledges Homeowners Association, Inc.

Dungan & Associates, P.A., by Robert E. Dungan, for respondents-appellees Owners of Lots in The Ledges of Hidden Hills Subdivision: Violet M. Myers, C. Donald Larsson/Trustee, Marilyn Barnwell, Charles S. and Cathryn A. Harrell, Thomas Rein Lugas, Jack H. and Roberta M. Crabtree, Dorothy Lois Shimon, Trust, William V. and Joann K. Phillips, Richard and Elizabeth C. Coombes, Guido D. and Eileen J. Migiano, Eugene M. and Lucretia B. Wagner, Jacqueline W. Eadie, Elizabeth H. Schad, Trust, Sunnie Taylor, Sue Edell and T. Hilliard Staton, Albert W. and Ursula K. Jenrette, Theresa M. Wuttke, John Fitzgerald and Robin Renee Holshue, Adrian R. and Marilyn B. Ades, Linda N. Ross, J.D. and Edwina S. Miller, Russell L. and Launa L. Shoemaker, Paul E. and Deborah H. Parker, William Scott and Elizabeth A. Chovan, David N. and Melanie D. Hutto, Tedd M. and Jeannie Pearce, Teresa M. Wuttke, Jimmie J. and Betty J. Remley, Terry N. and Michelle L. McAdoo, Joseph A. and Margaret K. Dinkins, Carlton W. and Frances A. Dence, Clifton F. and Donna Grubbs Sapp, Marvin G. and E. Joyce Katz, Joy N. Parisien, Lewis Edwin and Helen Bookman, and Dennis R. and Dondra C. Setser.

TYSON, Judge.

Robert Louis and Vivian B. Armstrong, L.A. and E. Ann Moore, William B. and Rae H. Clore (collectively, "petitioners") appeal judgment granting The Ledges Homeowners Association, Inc. and the owners of lots in The Ledges of Hidden Hills Subdivision: Violet M. Myers, C. Donald Larsson/Trustee, Marilyn Barnwell, Charles S. and

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Cathryn A. Harrell, Thomas Rein Lugas, Jack H. and Roberta M. Crabtree, Dorothy Lois Shimon, Trust, William V. and Joann K. Phillips, Richard and Elizabeth C. Coombes, Guido D. and Eileen J. Migiano, Eugene M. and Lucretia B. Wagner, Jacqueline W. Eadie, Elizabeth H. Schad, Trust, Sunnie Taylor, Sue Edell and T. Hilliard Staton, Albert W. and Ursula K. Jenrette, Theresa M. Wuttke, John Fitzgerald and Robin Renee Holshue, Adrian R. and Marilyn B. Ades, Linda N. Ross, J.D. and Edwina S. Miller, Russell L. and Launa L. Shoemaker, Paul E. and Deborah H. Parker, William Scott and Elizabeth A. Chovan, David N. and Melanie D. Hutto, Tedd M. and Jeannie Pearce, Teresa M. Wuttke, Jimmie J. and Betty J. Remley, Terry N. and Michelle L. McAdoo, Joseph A. and Margaret K. Dinkins, Carlton W. and Frances A. Dence, Clifton F. and Donna Grubbs Sapp, Marvin G. and E. Joyce Katz, Joy N. Parisien, Lewis Edwin and Helen Bookman, and Dennis R. and Dondra C. Setser's (collectively, "respondents") motion for summary judgment. We affirm.

I. Background

Vogel Development Corporation (the "developer") developed The Ledges of Hidden Hills ("The Ledges"), a forty-nine lot subdivision, in 1988. The developer recorded a declaration of restrictive covenants (the "declaration") for The Ledges on 9 December 1988. The declaration provided for the intended formation of a non-profit homeowners' association and for assignment to the association of "any and all of [the developer's] rights, authorities, and consents granted and/or reserved under the provisions of these Restrictive Covenants or any amendments thereto." Paragraph 36 of the declaration provided for future amendments to be made as follows: "that any portion of the restrictive covenants may be released, changed, modified or amended by majority vote of the then property owners within this Subdivision."

In September 1994, The Ledges Homeowners Association, Inc. (the "association") was formed and bylaws were adopted. At the 1995 annual meeting, the association adopted an amendment to the declaration which stated, "The Association shall have a lien on any lot of an Owner who has failed to pay the assessment, for the enforcement of collection [of] the assessment." The association began billing the residents for various expenses including electrical service to light the subdivision sign at night, the mowing of certain lawns, snow removal, operating expenses, and legal fees.

Petitioners William B. and Rae H. Clore purchased their property in 1994. Petitioners Robert Louis and Vivian B. Armstrong purchased

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their property in 2001. Petitioners L.A. and E. Ann Moore purchased their property in 2002. Petitioners' deeds contain provisions subjecting their lots to the restrictive covenants and for membership in the association:

This conveyance is made subject to restrictive covenants and conditions pertaining to The Ledges of Hidden Hills recorded in Deed Book 729, at Page 809, Henderson County Registry, together with any amendments thereto . . . The grantor herein contemplates the establishment of a non-profit corporation to be known as The Ledges of Hidden Hills Homeowners Association, and by acceptance of this deed the grantees agree to become and shall automatically so become members of said Homeowners Association when so formed by said grantor; and said grantees agree to abide by the corporate charter, bylaws, and rules and regulations of said Homeowners Association and agree to pay pro-rata charges and assessments which may be levied by said Homeowners Association when so formed.

In July 2003, the board of directors for the association voted to amend the bylaws. The board of directors adopted a draft set of bylaws, which were later revised to eliminate any references to the North Carolina Planned Community Act. The proposed amendment provided for: (1) automatic membership in the association; and (2) the collection and enforcement of assessments on members of the association.

Petitioners filed their complaint on 16 October 2003. On 20 November 2003, the association adopted the current bylaws. On 24 November 2003, The Ledges' property owners adopted the "Amended and Restated Restrictive Covenants of the Ledges of Hidden Hills." On 20 October 2004, the trial court entered summary judgment for respondents. Petitioners appeal.

II. Issues

Petitioners argue the trial court erred by: (1) granting summary judgment in favor of respondents and denying summary judgment in favor of petitioners; (2) denying permanent injunctive relief to petitioners; (3) failing to render the declaratory relief sought by petitioners that The Ledges is not a "planned community" as that term is defined in N.C. Gen. Stat. 47F-1-103(23); and (4) failing to render declaratory relief to petitioners that the Amended Declaration adopted by a majority of respondents is invalid and such amendment

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cannot be used as a vehicle to impose general assessments on lot owners within The Ledges.

III. Summary Judgment

Petitioners first contend the trial court erred in granting summary judgment in favor of respondents and denying the motion for summary judgment in favor of petitioners. Petitioners argue the proposed amendment to the Declaration exceeds the purpose for which the Declaration was established. We disagree.

Where a motion of summary judgment is granted, the critical questions for determination upon appeal are whether on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law.

Oliver v. Roberts, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981) (citing *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *cert. denied*, 295 N.C. 733, 248 S.E.2d 862 (1978)).

As our Supreme Court stated, “The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.” *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). Here, both parties stipulate there is no dispute of a material fact and the issue is a question of law. The trial court properly granted summary judgment in favor of respondents based on the question of law as explained below.

IV. Injunctive Relief

[1] Petitioners also contend the trial court erred in denying permanent injunctive relief. We disagree.

Petitioners argue the association should be enjoined from attempting to adopt and enforce the bylaws as amended. Petitioners do not seek to have the original restrictive covenants set aside. Rather, petitioners seek to have the amended bylaws declared void because they exceed the developer’s original intent in the original declaration.

However, “[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.” *Walton*

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v. City of Raleigh, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citing *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624-25 (1973)). Here, the declaration provides, “that any portion of the restrictive covenants may be released, changed, modified or amended by majority vote of the then property owners within this Subdivision.” The developer intended, and the declaration expressly allows, the lot owners the opportunity to alter the terms of the declaration by majority vote. A majority of respondents used the provision to implement changes that are at issue here. This assignment of error is overruled.

V. Amended Declaration

[2] Petitioners contend the trial court erred in failing to render declaratory relief to petitioners by holding that the amended declaration adopted by a majority of respondents is invalid and such amendment cannot be used as a vehicle to impose general assessments on lot owners within The Ledges. We disagree.

The original restrictive covenants were amended to include provisions for: (1) automatic membership in the association; and (2) the collection and enforcement of assessments. While this issue is one of first impression in North Carolina, several other jurisdictions have decided similar cases.

In *Evergreen Highlands Ass’n v. West*, the court affirmed amendments to the existing restrictive covenants which were adopted nine years after the plaintiff-owner purchased a lot. 73 P.3d 1 (Colo., 2003), *cert. denied*, 540 U.S. 1106, 157 L. Ed. 2d 892 (2004). The amendments required all property owners to be members of the community association and pay assessments to the association. The court stated, “the addition of a new covenant falls within the permissible scope of the modification clause of the Evergreen Highlands covenants.” *Id.* at 2.

Also, in *Windemere Homeowners’ Ass’n v. McCue*, the Montana Supreme Court upheld amendments to the original restrictive covenants which created a homeowners’ association and gave the association the right to assess and collect assessments for the costs of road maintenance. 990 P.2d 769, 773 (Mont., 1999) (“We hold that the language of the original declaration of restrictive covenants was broad enough to authorize the subsequent 1997 Amendment by a super-majority of sixty-five percent or more of the property owners.”).

Petitioners conceded during oral argument that a uniform plan of development existed when the subdivision was developed and when

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petitioners purchased their properties. Petitioners' individual deeds contain specific provisions to subject their lots to the restrictive covenants and for lot owners' automatic membership in the association when formed. The developer of the Ledges intended for the association to have the power to amend the restrictive covenants as follows: "that any portion of the restrictive covenants may be released, changed, modified or amended by majority vote of the then property owners within this Subdivision." The amended declaration fulfills the developer's original intention that the homeowners, by majority vote, may amend the restrictions. Providing for mandatory membership in the association and permitting the association to assess and collect fees from the association's members is not clearly outside the intention of the original restrictive covenants and is generally consistent with the rights and obligations of lot owners of subdivisions subject to restrictive covenants and homeowners' associations. Petitioners accepted their deeds with the knowledge that the restrictive covenants may be amended in the future. "A grantee, who accepts a deed containing otherwise valid covenants purporting to bind him, thereby becomes bound for the performance of such covenants." *Cummings v. Dosam, Inc.*, 273 N.C. 28, 31, 159 S.E.2d 513, 516 (1968). The amendments were adopted and enacted by the requisite property owners in conformity with the express requirements of a uniform plan of development and express powers that are set out in the restrictive covenants that are binding upon petitioners. This assignment of error is overruled.

VI. Planned Community Act

[3] Petitioners argue the trial court erred in failing to render the declaratory relief sought by petitioners that The Ledges is not a "planned community" as defined in N.C. Gen. Stat. § 47F-1-103(23). It is unnecessary to decide this issue.

Petitioners contend respondents attempted to create a "planned community" when the amended declaration was proposed. Petitioners argue The Ledges was never intended to be a planned community because no common amenities or real estate are maintained by the association.

The Planned Community Act became effective in North Carolina in January 1999 and provides any planned community created prior to 1 January 1999 may elect to make it applicable to that community by a vote of the lot owners holding at least sixty-seven percent of the votes in the homeowners' association. N.C. Gen. Stat. § 47F-1-102(d)

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(2003). A planned community includes “[r]eal estate with respect to which any person, by virtue of that person’s ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration.” N.C. Gen. Stat. § 47F-1-103(23) (2003).

Because neither the current bylaws nor the amended restrictive covenants refer to or adopt the Planned Community Act, the applicability of the Planned Community Act to this subdivision is not before us. It is unnecessary to determine whether The Ledges is a planned community. “The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions . . . provide for contingencies which may hereafter arise, or give abstract opinions.” *In re Wright*, 137 N.C. App. 104, 111-12, 527 S.E.2d 70, 75 (2000) (quoting *Little v. Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960)). This assignment of error is dismissed.

VII. Conclusion

The trial court properly granted summary judgment for respondents. The trial court did not err in denying permanent injunctive relief or in failing to render declaratory relief to petitioners. The trial court’s judgment is affirmed.

Affirmed.

Judges STEELMAN and GEER concur.

RANDY R. LEWIS, EMPLOYEE, PLAINTIFF v. BEACHVIEW EXXON SERVICE, EMPLOYER,
AND PENN NATIONAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA04-711

(Filed 18 October 2005)

Workers’ Compensation— payments for three years after Form 60—estoppel—not addressed

The Industrial Commission erred in a workers’ compensation case by failing to address estoppel. It is undisputed that defendants paid plaintiff for three years after the Form 60 before con-

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testing compensability (N.C.G.S. § 97-18(d) requires that the claim be contested within ninety days of the injury).

Judge STEELMAN concurring in part and dissenting in part.

Appeal by plaintiff from opinion and award entered by the North Carolina Industrial Commission on 30 January 2004. Heard in the Court of Appeals 1 March 2005.

Wilson & Ratledge, P.L.L.C., by Perry J. Pelaez, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Buxton S. Copeland & Meredith T. Black, for defendant-appellees.

HUDSON, Judge.

Deputy Commissioner W. Bain Jones heard this case on 25 February 2002 and filed an opinion and award on 31 July 2002, awarding plaintiff temporary total disability, medical benefits, and attendant care for his claim related to his pulmonary condition. Defendants appealed to the Full Commission which, on 30 January 2004, reversed the opinion of the deputy commissioner. Plaintiff appeals. For the reasons discussed below, we remand the case for further findings and conclusions.

The evidence tends to show that on 16 September 1997, while working as a mechanic for defendant-employer, plaintiff felt a pop and severe pain in the abdomen when he used a pry bar to change a crankshaft. Plaintiff notified defendant-employer and went to Carteret General Hospital (the hospital) the following day, where he was diagnosed with a hernia. On 19 September 1997, Dr. Richard Wray surgically repaired the hernia. Plaintiff was released from the hospital the following day, 20 September 1997. On 21 September 1997, plaintiff developed chest tightness, shortness of breath, and wheezing. He went back to the hospital, where he was diagnosed with pneumococcal pneumonia and re-admitted. Plaintiff was treated with antibiotics and discharged approximately one week later, with a diagnosis of severe obstructive lung disease.

By 7 October 1997, plaintiff's hernia had healed. On 22 October 1997, Dr. Wray released plaintiff to work concerning his hernia repair. However, Dr. Joseph Nutz continued to treat plaintiff's pulmonary condition and did not release him to work. On 25 October 1997, plaintiff again experienced chest tightness, shortness of breath, coughing

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and congestion. He returned to the hospital for four days and was diagnosed with chronic obstructive pulmonary disease. Plaintiff had asthma as a child and smoked all of his adult life.

In November 1997, defendants referred plaintiff to Dr. Ted Kunstling, a pulmonary disease specialist. After examining plaintiff, Dr. Kunstling determined that plaintiff had experienced acute “exacerbation of chronic obstructive pulmonary disease by a lower respiratory infection, which occurred subsequent to his inguinal hernia repair.” In an evaluation letter to defendants’ claims representative, Dr. Kunstling indicated that plaintiff’s pulmonary condition was causally related to the hernia operation. Defendants then filed a Form 60, admitting plaintiff’s right to compensation as of 31 December 1997.

In April 1998, Dr. Kunstling indicated plaintiff could return to work in jobs that required no strenuous exertion and no exposure to dust, fumes, or extreme temperatures. On 28 May 1998, Dr. Kunstling determined that plaintiff had reached maximum medical improvement as to his asthma but would continue to need treatment for future exacerbations. Although plaintiff was offered several jobs, he was too symptomatic to accept employment, as verified by Dr. Kunstling. On 13 May 1999, Dr. Kunstling indicated that plaintiff was totally and permanently disabled due to his pulmonary condition.

Plaintiff filed a Form 33 on 8 July 2000, for failure to pay medical expenses. On 26 September 2000, defendants filed a Form 33R, contending that plaintiff’s condition was not causally related to his compensable injury from 16 September 1997. Then on 4 October 2000, defendant-carrier filed a Form 62, reducing plaintiff’s temporary total disability for alleged prior miscalculation of the average weekly wage. Defendants hired Dr. Gregory Pape, Chief of Pulmonary and Critical Care Medicine at East Carolina School of Medicine, and Dr. Albert Schwartz, Chief of Pulmonary Medicine at Duke University to review plaintiff’s case. Dr. Schwartz examined plaintiff on 8 February 2001, and Dr. Pape evaluated him on 15 February 2001. Both doctors also reviewed the medical records and each independently concluded that plaintiff’s pulmonary condition was not the result of his surgery or hospital-acquired pneumonia, but rather was the result of smoking, pre-existing asthma, and community-based pneumonia acquired *prior* to his hernia surgery.

Plaintiff’s first three arguments in his brief essentially assert that the Commission erred by failing to address his estoppel defense.

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Plaintiff argues that N.C. Gen. Stat. § 97-18(d) (2000) required defendants to contest plaintiff's claim within ninety days from his injury and that they failed to do so. It is undisputed that after filing a Form 60, defendants paid plaintiff for three years before contesting the compensability of the injury. Plaintiff contends that defendants waived their right to contest compensability of his pulmonary condition when they did not contest it within ninety days of the injury. Similarly, plaintiff argues that because defendants paid him for three years without denying his claim, that they should now be estopped from denying his claim. Without addressing the merits of plaintiff's substantive arguments here, we conclude that the Commission erred in failing to address these issues.

The parties stipulated that the issues before both the deputy commissioner and the Full Commission included "whether defendants are estopped from denying plaintiff's pulmonary condition." These stipulations of the issues are set forth in both opinions. The scope of this Court's review of an Industrial Commission decision is limited:

(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.

Deese v. Champion Int'l Corp., 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). We may not "weigh the evidence and decide the issue on the basis of its weight," but must only determine whether the record contains "any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (internal citation and quotation marks omitted). However, the Commission made no findings of fact or conclusions of law regarding waiver or estoppel here.

"While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 511 (2004) (internal citations and quotations omitted). More specifically, the Commission must address the issue of estoppel. *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 338, 527 S.E.2d 689, 693 (2000); see also *Bowen v. Cra-Mac Cable Services, Inc.*, 60

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N.C. App. 241, 247, 298 S.E.2d 760, 763 (1983). Here, as in *Purser*, “the Industrial Commission failed to consider the application of the doctrine of estoppel to the factual scenario at hand.” 137 N.C. at 338, 527 S.E.2d at 693. Accordingly, we remand this matter to the Industrial Commission for further proceedings and to make findings of fact and conclusions of law regarding all issues raised by the evidence upon which plaintiff’s right to compensation depends.

In light of this conclusion, we decline to address plaintiff’s other arguments.

Reversed and remanded.

Judge WYNN concurs.

Judge STEELMAN concurs in part and dissents in part in a separate opinion.

STEELMAN, Judge concurring in part and dissenting in part.

I concur with the majority opinion, remanding this matter to the Industrial Commission for further findings of fact and conclusions of law on the issue of estoppel. This issue was clearly before the Commission, is specifically mentioned in the Opinion and Award, and was extensively discussed in Commissioner Ballance’s dissenting opinion. However, the Commission made no findings of fact or conclusions of law on this issue.

I dissent as to the majority opinion’s refusal to discuss the remaining issues brought forward by plaintiff’s appeal, and specifically to the remanding of this case to the Commission, allowing it to make findings and conclusions as to “all issues raised by the evidence upon which plaintiff’s right to compensation depends.”

The estoppel issue is entirely separate and distinct from the issue of whether plaintiff is entitled to receive compensation under the facts of this case. If the Commission erred in not awarding compensation, then this renders the estoppel question moot. If the Commission properly denied compensation, then this limits the scope of the Commission’s review upon remand to the question of estoppel.

Plaintiff brings forward four arguments challenging the findings of fact and conclusions of law. “Appellate review of an order and

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award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission. This is so even though there is evidence which would support a finding to the contrary.” *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992) (citation omitted).

The essential facts in this case are not in dispute. Plaintiff suffered a hernia on 16 September 1997 in the course and scope of his employment. On 19 September 1997, the hernia was surgically repaired, and plaintiff was released from the hospital the following day. On 21 September 1997, plaintiff was admitted to the hospital with pneumococcal pneumonia. Plaintiff was subsequently found to be totally and permanently disabled as a result of chronic obstructive pulmonary disease. The dispute in this case is over the conflicting opinions of medical experts on two points: (1) whether plaintiff contracted pneumococcal pneumonia while hospitalized for his hernia surgery; and (2) whether the pneumonia resulted in an exacerbation of his prior chronic pulmonary disease.

As to the first point, plaintiff’s expert, Dr. Kunstling, based his opinion that the pneumonia was a “complication of the surgery” upon the temporal relationship between his hospitalization and contracting pneumonia, and the type of pneumonia. Defendant’s expert, Dr. Pape, rendered an opinion that the pneumonia was unrelated to his hospitalization. This was based upon the temporal relationship between the hospitalization and the type of pneumonia. Dr. Pape testified that when a patient develops pneumonia within 5 days of hospitalization, it was more likely acquired in the community and not the hospital. Since plaintiff developed pneumonia within two days of his hospitalization, it was acquired in the community, prior to his hospitalization.

As to the second point, Dr. Kunstling gave an opinion that plaintiff experienced “an exacerbation of chronic obstructive pulmonary disease by a lower respiratory infection, which occurred subsequent to his surgical hernia repair.” Dr. Pape testified that plaintiff’s subsequent respiratory problems were not related to his hernia surgery. Defendant’s other expert, Dr. Schwartz, testified that the respiratory and pulmonary problems that plaintiff experienced were unrelated to the hernia surgery. He further opined that plaintiff’s current condition was not aggravated by the pneumonia.

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The Commission made the following finding concerning the testimony of these experts:

21. Though he treated plaintiff prior in time to Dr. Pape and Dr. Schwartz, Dr. Kunstling is not in a better position than these doctors to determine whether plaintiff's hernia surgery is the cause of plaintiff's subsequent pulmonary and respiratory conditions. Dr. Kunstling bases his causation opinion on incorrect facts and on a temporal relation between the hernia surgery and the respiratory problems plaintiff has developed. Dr. Kunstling's opinion is given less weight than that of Dr. Pape and Dr. Schwartz, who both opine that plaintiff's current pulmonary conditions are a result of a combination of his 20-plus year smoking history, his asthma and the community-based pneumonia he acquired prior to his hernia surgery.

The credibility of witnesses and the weight to be given to a witness' testimony are matters for the Industrial Commission to decide. *Russell v. Lowes Prod. Distr.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). I would hold that there is evidence before the Commission to support each of the challenged findings of fact. It is irrelevant whether there is evidence that would support contrary findings. *Simon*, 106 N.C. App. at 41, 415 S.E.2d at 106. The opinions of each of the experts were proper and admissible. When faced with conflicting expert opinions, it is for the Commission to resolve these conflicts. *Wagoner v. Douglas Battery Mfg. Co.*, 80 N.C. App. 163, 164, 341 S.E.2d 120, 121 (1986) (citation omitted). The Commission's findings support its conclusions that the plaintiff's disability was not the result of his hernia surgery.

I would affirm the Commission's decision that plaintiff's pulmonary condition was not the result of his hernia surgery and is not compensable, and that the hernia surgery did not materially aggravate or exacerbate his pre-existing pulmonary condition.

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321 NEWS & VIDEO, INC., PETITIONER v. THE ZONING BOARD OF ADJUSTMENT FOR
THE CITY OF GASTONIA AND THE CITY OF GASTONIA, NORTH CAROLINA,
RESPONDENTS

No. COA04-1521

(Filed 18 October 2005)

1. Zoning— adult bookstore—variance

The trial court did not err by affirming the Board of Adjustment's denial of a zoning variance to an adult bookstore because the store was too close to a residential area and a public park. Although petitioner contended that the trial court should have considered evidence of the lack of secondary effects from the bookstore, the ordinance conditions the variance on whether specified buffers are present to protect against secondary effects rather than considering whether those effects were in fact present.

2. Zoning— variance—constitutionality of ordinance—not considered

Neither the Board of Adjustment, the superior court, nor the Court of Appeals could consider the constitutionality of a zoning ordinance when deciding whether to grant a variance. The Board had only the authority to grant or deny the variance, and the superior court and Court of Appeals had only the authority to consider whether the variance was properly granted or denied. This is so even if the constitutional argument appears under some other label.

Appeal by petitioner from judgment entered 27 April 2004 by Judge Yvonne Mims Evans in Gaston County Superior Court. Heard in the Court of Appeals 9 June 2005.

Joseph L. Ledford for petitioner-appellant.

Office of the Gastonia City Attorney, by Assistant City Attorneys Melissa A. Magee and L. Ashley Smith, for respondent-appellee.

STEELMAN, Judge.

Petitioner, 321 News & Video, Inc., operates an adult bookstore located in Gastonia, North Carolina. On 19 July 1994, respondent, the City of Gastonia (City), adopted an adult establishment zoning ordinance, Section 17-92(61)(d), which imposed a 500-foot separation

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requirement between adult establishments and certain enumerated uses. These uses included: schools, public parks, playgrounds, libraries, daycare centers, churches or houses of worship, or any residential zoning district. The ordinance also included an eight-year amortization period for non-conforming adult establishments to either comply with the ordinance or cease operation. Pursuant to N.C. Gen. Stat. § 160A-388 and the provisions of the City's zoning ordinance, the Zoning Board of Adjustment (Board) was given authority to grant a variance from the separation requirements. The Board could grant a variance if it found that certain buffers were present that were likely to provide adequate means of protection from the secondary effects of an adult establishment. Gastonia Code Section 17-92(61)(k).

Petitioner has operated an adult bookstore at the same location in Gastonia since 1992. It was required to comply with the separation requirement by 2002, as it is located within 500 feet of a residential zone and a public park. On 14 March 2002, the City notified petitioner that its continued operation as an adult bookstore would be a violation of Section 17-92(61) and advised the bookstore that it was required to either comply with the zoning ordinance or cease operating within the Gastonia city limits. Petitioner filed a petition for a variance from the separation requirements of the zoning ordinance. The Board held a hearing on the matter and denied petitioner's request for a variance. Petitioner filed a petition for *writ of certiorari* to the Gaston County Superior Court seeking review of the Board's denial of its variance request. The trial court affirmed the Board's ruling. Petitioner appeals.

[1] In petitioner's sole assignment of error it contends the trial court erred in affirming the Board's denial of its request for a variance. We disagree.

Petitioner stipulated before the trial court that there was substantial, competent, and material evidence in the record to support the Board's findings of fact, as well as its decision to deny it a variance. Rather, petitioner's contention is that by not considering evidence of the lack of secondary effects associated with its adult establishment before denying its application for a variance, the Board's decision was arbitrary and capricious.

The Board's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppres-

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sive or attended with manifest abuse of authority.’ ” *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (citations omitted). Since the Board operates as the fact finder, the superior court sits as a court of appellate review. *Id.* As such, the trial court does not review the sufficiency of evidence presented to it, but rather reviews that evidence presented to the Board. *Id.*

The applicable standard of review when the trial court sits in the posture of an appellate court depends on the type of error assigned. *Id.* at 13, 565 S.E.2d at 17. The trial court conducts *de novo* review when considering allegations that the board’s decision was affected by error of law. *Id.* If the petitioner asserts the board’s decision is not supported by the evidence or is arbitrary and capricious, the trial court must apply the whole record test. *Id.* Under the whole record test, the trial court examines the entire record to determine whether it contains substantial evidence to support the agency’s decision. *Id.* at 14, 565 S.E.2d at 17. In doing so, the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency. *Id.* at 14, 565 S.E.2d at 17-18. Finally, the trial court “must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.” *Id.* at 13, 565 S.E.2d at 17.

When this Court reviews the trial court’s order concerning a board’s decision, we examine the order to: (1) determine whether the trial court exercised the appropriate standard of review and, if so, (2) decide whether the court did so properly. *Id.* at 14, 565 S.E.2d at 18.

Here, the trial court’s order states it applied the whole record test. This is the appropriate standard of review since petitioner contends the Board’s denial of a variance was arbitrary and capricious in light of its failure to consider evidence of the absence of secondary effects associated with its adult establishment despite the lack of buffers. Petitioner concedes it is an adult establishment within the meaning of the ordinance and is subject to the separation requirement. Petitioner further concedes it is located within 500 feet of a residential zone and a public park, both protected uses enumerated in the zoning ordinance. Therefore, before the Board could grant a variance from the separation requirement it had to find there was a “freeway or Interstate-type highway, traffic circulation patterns, structures, or other natural or man-made geographic or topographic features . . . likely to provide an adequate means of protection for

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the protected zoning or use from any secondary effects of the adult establishment.” Gastonia Code Section 17-92(61)(k).

Petitioner challenges this limitation in the ordinance that conditions the issuance of a variance on whether certain specified buffers are present to protect against secondary effects, rather than considering whether the secondary effects were in fact present, regardless of whether the specified buffers were in place. It is clear from the record in this matter that the Board did allow petitioner to present evidence of the lack of actual secondary effects. However, in drafting its decision, the Board is not required to recite all of the evidence presented at the hearing. *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). It need only recite “those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.” *Id.* The test, as recited above, is whether the findings of fact are supported by the evidence, and whether those findings, in turn, support the conclusion of law. *Mann*, 356 N.C. at 13, 565 S.E.2d at 17. Here, petitioner so stipulated.

We hold that the trial court correctly determined that the Board properly denied the petitioner’s request for a variance based upon the express terms and conditions set forth in the ordinance. The fact that petitioner does not agree with the City’s decision to limit the criteria to be considered at a variance hearing does not render a decision by its Board of Adjustment arbitrary and capricious. This argument is without merit.

[2] Petitioner contends in the alternative that the zoning ordinance is unconstitutional as applied because the Board’s failure to consider the evidence of the lack of secondary effects violates its First Amendment right to free speech and expression. Petitioner concedes the Board, as well as the superior court and this Court are precluded from considering the constitutionality of the applicable zoning ordinance when determining whether to grant a variance.

In *Sherrill v. Town of Wrightsville Beach*, this Court held the constitutionality of an ordinance was not properly before the board of adjustment or the reviewing courts stating:

The board of aldermen, sitting in their quasi-judicial capacity as the board of adjustment in this case, only had the authority to grant or deny a variance under the zoning ordinance. G.S. 160A-388(d). The Board’s decision was to deny the vari-

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ance. Under G.S. 160A-388(e) the superior court, and hence this Court through our derivative appellate jurisdiction, had the statutory power to review only the issue of whether the variance was properly denied. The constitutionality of the zoning ordinance is a separate issue not properly a part of these proceedings since the denial of the variance request never addressed the validity of the zoning ordinance. Furthermore, the superior court sat in the posture of an appellate court, so it was not in a position to address constitutional issues that were not before the board.

76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985) (internal citations omitted). *See also Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62-63, 344 S.E.2d 272, 279 (1986) (noting this Court in *Sherrill* properly refused to address the petitioner's challenge to the constitutionality of a particular zoning ordinance where the previous courts had not ruled on that issue); *Dobo v. Zoning Bd. of Adjust. of Wilmington*, 149 N.C. App. 701, 706-07, 562 S.E.2d 108, 111-12 (2002), *rev'd in part on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003). The Board only had the authority to grant or deny the variance under the zoning ordinance. *Sherrill*, 76 N.C. App. at 649, 334 S.E.2d at 105; *Simpson v. City of Charlotte*, 115 N.C. App. 51, 55, 443 S.E.2d 772, 775 (1994). The superior court, sitting as an appellate court and acting pursuant to a writ of *certiorari* under N.C. Gen. Stat. § 160A-388(e), only had the power to consider whether the variance was properly granted or denied. *Simpson*, 115 N.C. App. at 55, 443 S.E.2d at 775. Likewise, this Court's review is limited to a determination of whether the variance was properly denied under the existing ordinance. *Sherrill*, 76 N.C. App. at 649, 334 S.E.2d at 105.

Petitioner asserts that although the issues raised in its appeal include constitutional considerations regarding the absence of secondary effects surrounding the area where the adult bookstore is located, its constitutional arguments are not being offered as a constitutional attack. Rather, petitioner contends that since adult uses are entitled to a variance from separation requirements contained in an adult zoning ordinance upon a showing that there are sufficient buffers that lessen the likelihood of adverse secondary effects, the Board's decision to deny it the variance was arbitrary and capricious because it failed to consider evidence of the lack of secondary effects associated with its adult bookstore. No matter the label petitioner places on its argument, the effect is the same; it challenges the constitutionality of the ordinance as applied to it. Therefore, it was not a proper consideration for the Board, the superior court, or this Court.

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For the reasons discussed herein, we affirm the trial court's ruling in which it affirmed the Board's denial of petitioner's request for a variance.

AFFIRMED.

Judges HUDSON and JACKSON concur.

JENNIE LYNN BILLINGS AND EVERETTE BILLINGS, PLAINTIFFS v. JEROME H. ROSENSTEIN, M.D., THOMAS J. MASCENIK, M.D., AND FOOTHILLS CENTER FOR WOMEN, P.A., DEFENDANTS

No. COA04-1647

(Filed 18 October 2005)

Witnesses; Medical Malpractice— standard of care—out-of-state expert—qualifications

A Johns Hopkins professor was competent to testify as an expert to the appropriate standard of care of a neurologist in Wilkes County where he based his opinion on demographic data and his familiarity with similar communities, was licensed in North Carolina and had practiced in multiple communities in the State, and was board certified in the same specialty as defendant. Moreover, his testimony presented issues of fact as to whether defendant breached the standard of care, and summary judgment for defendant was reversed. N.C.G.S. § 90-21.12.

Appeal by Plaintiffs from judgment entered 16 August 2004 by Judge Clarence E. Horton, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 13 September 2005.

Knott, Clark & Berger, L.L.P., by Bruce W. Berger, and L.G. Gordon, Jr., for plaintiff-appellants.

Wilson & Iseman, L.L.P., by G. Gray Wilson, Linda L. Helms, and Maria C. Papoulias, for defendant-appellee Thomas J. Mascenik.

WYNN, Judge.

To establish the relevant standard of care for a medical malpractice action, an expert witness must demonstrate that he is familiar

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with the standard of care in the community where the injury occurred, or the standard of care of similar communities. N.C. Gen. Stat. § 90-21.12 (2004). In this case, the doctor could testify, as an expert witness, about the relevant standard of care, as he established that he was familiar with the community or a similar community. Accordingly, we reverse the trial court's summary judgment in favor of Defendant.

The facts tend to show that in February 2003, Plaintiffs Jennie Lynn Billings and Everette Billings brought an action against Defendants Thomas J. Mascenik, M.D., Jerome H. Rosenstein, M.D., and Foothills Center for Women, P.A., alleging that Defendants negligently treated Ms. Billings, resulting in her "becoming physically debilitated and incapacitated[.]" after having a stroke due to undiagnosed eclampsia.¹ The Complaint further alleged that Dr. Mascenik, a specialist in the field of neurology, treated Ms. Billings at Wilkes Regional Medical Center in Wilkes County, North Carolina.

In support of their allegations, the Billingses presented expert medical testimony by Dr. Peter Kaplan, M.D., a neurologist practicing in Baltimore, Maryland and a professor at John Hopkins University School of Medicine. Dr. Kaplan worked at Duke University Medical Center in Durham, North Carolina for three years, where he completed his residency and fellowship. Dr. Kaplan had a license to practice medicine in the State of North Carolina, but had not practiced in North Carolina in over fifteen years. While practicing in North Carolina, Dr. Kaplan worked with an outreach program in Fayetteville, North Carolina.

During his deposition testimony, Dr. Kaplan testified that he was familiar with the standard of care for neurologists practicing in the Wilkes County, North Carolina area. Dr. Kaplan said that his familiarization with the standard of care in that area came from his personal experience working in North Carolina, specifically, his work in Fayetteville, his experience with patients that are sent from outlining areas, as well as studying the demographic data of Wilkes County. However, Dr. Kaplan did admit that he had never been to Wilkes Regional Medical Center and had no personal knowledge about Wilkes Regional Medical Center.

On 17 May 2004, Dr. Mascenik filed a Motion for Summary Judgment on the grounds that Dr. Kaplan was not qualified to testify

1. The Complaint also included a cause of action for loss of consortium filed by Mr. Billings.

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as an expert witness as to the relevant standard of care, and the Billingses therefore failed to prove the standard of care. On 16 August 2004, the trial court granted summary judgment in favor of Dr. Mascenik, and later dismissed the claim without prejudice against the two remaining Defendants, Jerome H. Rosenstein, M.D. and Foothills Center for Women, P.A. Plaintiffs appeal from the 16 August 2004 order granting summary judgment.

On appeal, Plaintiffs argue that the trial court erred in granting Dr. Mascenik's Motion for Summary Judgment. We agree.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Also, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. *Id.* The court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004). But summary judgment is rarely appropriate in negligence cases. *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980); *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E.2d 294, 298 (1985).

"In a medical malpractice action, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998). Section 90-21.12 of the North Carolina General Statutes prescribes the appropriate standard of care in a medical malpractice action:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice *among members of the same health care profession with similar training and experi-*

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ence situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (emphasis added). “Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony.” *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003); *see Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998); *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2004).

Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, *see Warren v. Canal Indus., Inc.*, 61 N.C. App. 211, 215-16, 300 S.E.2d 557, 560 (1983), the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. *See, e.g., Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673; *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 210, 550 S.E.2d 245, 246-47, *aff’d per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001); *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997).

When determining whether an expert is familiar with the standard of care in the community where the injury occurred, “a court should consider whether an expert is familiar with a community that is similar to a defendant’s community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.” *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff’d per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005).

In *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003), this Court held that a doctor could testify regarding the standard of care when the doctor testified that: (1) he practiced in the Charlotte, North Carolina area and was licensed to practice throughout the State; (2) he was familiar with the standard of care of communities similar to Wilmington, North Carolina; and (3) he based his opinion on “Internet research about the size of the hospital, the training program, and the AHEC (Area Health Education Center) program.”

In *Pitts*, this Court held that a doctor could testify regarding the standard of care when the doctor was licenced in the State of North

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Carolina and practiced in multiple communities within the State, observed the community of Rocky Mount, North Carolina as well as noted the size of the hospital, and testified that the population and median income of Rocky Mount was similar to communities in which he practiced. *Pitts*, 167 N.C. App. at 198, 605 S.E.2d at 156-57.

In this case, Dr. Kaplan completed two years of his residency training and one year for a fellowship at Duke University in North Carolina. Dr. Kaplan is licensed in North Carolina and worked in Durham and Fayetteville. He has also given lectures in North Carolina on eclampsia and epilepsy seizures. Although Dr. Kaplan has never been to Wilkes Regional Medical Center and has no personal knowledge about Wilkes Regional Medical Center, he studied the demographic data of Wilkes County. Dr. Kaplan testified that he was familiar with the standard of care for a neurologist in the Wilkes County area based on his “own experience in North Carolina, and working in Fayetteville, as well as [his] experience with the patients being sent in from outlining areas. And it’s based on [his] learning of the demographic data of Wilkes County.”

Like in *Coffman*, where the doctor based his opinion of the relevant standard of care on demographic data and his familiarity with similar communities, *Coffman*, 153 N.C. App. at 624, 571 S.E.2d at 259, Dr. Kaplan based his opinion of the standard of care of neurologists in Wilkes County on demographic data and his familiarity with similar communities. Also, like in *Pitts* and *Coffman*, Dr. Kaplan is licensed in the State of North Carolina and has practiced in multiple communities in the State. See *Pitts*, 167 N.C. App. at 198, 605 S.E.2d at 156; *Coffman*, 153 N.C. App. at 624, 571 S.E.2d at 259. Accordingly, we find that Dr. Kaplan demonstrated that he was familiar with the standard of care in Wilkes County. See *Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156.

Also, the standard of care must be established by a licenced health care provider who specializes in the same or similar specialty as the medical professional. N.C. Gen. Stat. § 8C-1, Rule 702(b) (2004). Dr. Mascenik testified that he has a specialty in general consulting neurology. Dr. Kaplan is a board certified neurologist. Therefore, Dr. Kaplan specializes in the same specialty as Defendant Dr. Mascenik. N.C. Gen. Stat. § 8C-1, Rule 702(b).

We conclude that the Billingses’ expert witness demonstrated that he was sufficiently familiar with the standard of care “among members of the same health care profession with similar training and

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experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action” as to offer relevant and competent evidence regarding the alleged negligence by Dr. Mascenik. N.C. Gen. Stat. § 90-21.12. Accordingly, Dr. Kaplan was competent to testify as an expert witness to establish the appropriate standard of care of a neurologist in Wilkes County.

Dr. Kaplan also offered testimony that raised issues of material fact regarding whether Dr. Mascenik breached the standard of care. *See Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577. Dr. Kaplan testified that he “believed [Dr. Mascenik] breached the standard of care in not making the diagnosis of the eclampsia.” As the evidence, taken in the light most favorable to the Billingses, presents issues of material fact regarding Dr. Mascenik’s breach of the standard of care, summary judgment was not appropriate. *Id.*

Accordingly, we reverse the trial court’s grant of summary judgment and remand this case for trial.

Reversed and remanded.

Judges CALABRIA and LEVINSON concur.

YVONNE STEGENGA, PLAINTIFF V. JAMIE ALLEN BURNEY AND TINA LEE BURNEY,
AND UNNAMED DEFENDANT (ALLSTATE INSURANCE COMPANY), DEFENDANTS

No. COA04-1726

(Filed 18 October 2005)

**Insurance— automobile—underinsured motorist coverage—
rejection form**

The trial court’s grant of summary judgment for the unnamed defendant Allstate was proper in underinsured motorist claims based upon the insureds’ rejection of such coverage. Although plaintiff argues that Allstate’s Selection/Rejection form deviates from the form promulgated by the Rate Bureau, Allstate’s form uses the precise wording contained in the Rate Bureaus’ form in its entirety, with the inclusion of additional language explaining the coverage. Moreover, the presentation of the text is completely legible and does not impede the intent that consumers make an informed decision when selecting or rejecting coverage although

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it is in ten point type rather than the twelve point type set forth in the Rate Bureau's form.

Appeal by plaintiff from order entered 29 September 2004 by Judge Melzer A. Morgan in Randolph County Superior Court. Heard in the Court of Appeals 14 September 2005.

Roberson Haworth & Reese, PLLC, by Robert A. Brinson and Christopher C. Finan, for plaintiff-appellant.

Burton & Sue, L.L.P., by James D. Secor, III and Desiré E. Carter, for Allstate Insurance Company, unnamed defendant-appellee.

JACKSON, Judge.

On 15 June 2001 Yvonne Stegenga ("Plaintiff") was involved in a head-on collision with a car driven by Jamie Allen Burney and owned by his wife, Tina Lee Burney ("Defendants"). The accident occurred in Randolph County, North Carolina. Plaintiff suffered permanent physical injuries along with property damage. Defendants' insurance carrier tendered the limits of its liability insurance policy in the amount of \$30,000.00 to Plaintiff. At the time of the accident, Plaintiff was insured by Allstate Insurance Company ("Allstate").

In May 1996, Plaintiff had applied for an insurance policy through Allstate. When applying for coverage, Plaintiff completed a form entitled "Selection/Rejection Form Uninsured Motorists Coverage Combined Uninsured/Underinsured Motorists Coverage" ("Selection/Rejection Form"). On the form, Plaintiff selected the option stating, "I choose to reject Combined Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of" Allstate then issued an automobile insurance policy to Plaintiff, which remained in effect at the time of the 2001 accident. Plaintiff also was covered under an additional Allstate automobile insurance policy obtained by Paula Arnold in July 1996. At the time of Paula Arnold's application for coverage, she too completed a Selection/Rejection Form and she too chose the option "I choose to reject Combined Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of"

Following her settlement with Defendants' insurer, Plaintiff filed a claim with her insurance carrier, Allstate, for payment pursuant to the underinsured motorists ("UIM") coverage provision under both of

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the Allstate policies. Prior to her settlement with Defendants' insurance carrier plaintiff had commenced a civil action against Defendants. Allstate, as an unnamed defendant, filed an answer asserting a counterclaim for declaratory relief, citing the rejection of UIM coverage as a basis for its denial of coverage. Plaintiff subsequently filed a motion for summary judgment, asking that the court rule that she is entitled to judgment as a matter of law against unnamed defendant Allstate. In an order filed 29 September 2004, the trial court denied Plaintiff's motion, and, *sua sponte*, granted summary judgment in favor of Allstate.

In granting summary judgment for Allstate, the trial court concluded as a matter of law that: (1) "the two Selection/Rejection Forms utilized by Allstate in this matter were VALID;" (2) "the insureds' rejection of underinsured motorist coverage in the two Selection/Rejection forms was VALID;" and (3) "unnamed defendant Allstate has no obligation to provide underinsured motorist coverage to the plaintiff for any injuries, claims or damages arising out of the motor vehicle accident that is the subject of this litigation" From this order Plaintiff now appeals.

Plaintiff's sole assignment of error is that the trial court erred in granting summary judgment for unnamed defendant Allstate, in that Allstate's Selection/Rejection Forms were invalid, and thus Plaintiff's rejection of UIM was invalid.

Summary judgment is proper, when based on the pleadings and affidavits, there is "no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004); *see, Lowe v. Murchison*, 44 N.C. App. 488, 490, 261 S.E.2d 255, 256 (1980). Summary judgment may be rendered against a moving party when appropriate. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004); *A-S-P Assocs. v. Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447 (1979). Summary judgment for a non-moving party is proper "when the evidence presented demonstrates that no material issues of fact are in dispute, and the non-movant is entitled to entry of judgment as a matter of law." *A-S-P Assocs.*, 298 N.C. at 212, 258 S.E.2d at 447-48.

North Carolina General Statutes, section 20-279.21(b)(4) governs the rejection of UIM, and provides in relevant part:

The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.

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Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

N.C. Gen. Stat. § 20-279.21(b)(4) (2004). In regulating the rejection and selection of UIM, the North Carolina Rate Bureau created form NC 01 85 (Ed. 7-91), which is a Selection/Rejection Form for UIM which must be used by all insurance carriers in this State. This form was approved by the North Carolina Department of Insurance. When the Rate Bureau promulgated this form in 1991, it provided a circular letter to all member companies, and stated that the form's "language may not be changed or substantively amended, without prior approval, except that member companies may: 1. Add explanations of the uninsured and/or combined uninsured/underinsured motorists coverages;" North Carolina Rate Bureau, Circular Letter to All Member Companies, (Sept. 9, 1991).

Plaintiff argues that Allstate's Selection/Rejection Form deviates substantially from the required form, in that the form utilized by Allstate contains additional language at the top of the form, a solid line separating the additional language from the Rate Bureau Form, and the text of the Rate Bureau Form is reduced to a space of 7 by 5 inches and appears in a smaller font size. The text on the form promulgated by the Rate Bureau is in a space of 7 by 10 inches, and is printed in 12 point font. However, the lower portion of Allstate's Selection/Rejection Form includes the precise wording contained in the Rate Bureau's form in its entirety, while the upper portion contains a description of uninsured motorists coverage and the additional coverage received when adding combined uninsured/underinsured motorists coverage.

Our courts previously have adopted the requirement that the Rate Bureau's form be strictly adhered to in the selection or rejection of UIM. *See State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782 (1999); *Sanders v. American Spirit Ins. Co.*, 135 N.C. App. 178, 519 S.E.2d 323 (1999). In addition, we also previously have addressed the issue of forms that have been reduced in size or contain additional language. *See Erie Ins. Exch. v. Miller*, 160 N.C. App. 217, 584 S.E.2d 857 (2003) (rejecting a Selection/Rejection Form measuring 2 1/2 by 4 inches, with dramatically reduced font size); *Blackburn v. State Farm Mut. Auto. Ins. Co.*, 141 N.C. App. 655, 540 S.E.2d 63 (2000) (upholding a Selection/Rejection form containing

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explanatory language), *disc. review denied*, 353 N.C. 369, 547 S.E.2d 409 (2001).

In *Erie Insurance Exchange v. Miller*, 160 N.C. App. 217, 584 S.E.2d 857 (2003), we held that Erie's Selection/Rejection Form was invalid when it was included in Erie's insurance application form as a separate section, measured only 2 1/2 by 4 inches, and the text was reduced to 5.5 point type. We held that Erie's form did not strictly adhere to the form promulgated by the State Bureau, and thus was not a valid rejection of UIM. *Id.* at 223, 584 S.E.2d at 861. Plaintiffs contend that Allstate's Selection/Rejection Form is substantially similar to that in *Erie*, and that it too should be found to be invalid. We disagree.

In *Blackburn v. State Farm Mutual Automobile Insurance Co.*, 141 N.C. App. 655, 540 S.E.2d 63 (2000), *disc. review denied*, 353 N.C. 369, 547 S.E.2d 409 (2001), we upheld the validity of State Farm's Selection/Rejection Form when the only deviation from the Rate Bureau's form was the inclusion of additional language that explained uninsured and UIM coverage. There, we held that State Farm's additional language was in conformity with the guidelines set by the Rate Bureau and the Department of Insurance. *Id.* at 659, 547 S.E.2d at 65. The Selection/Rejection Form used by Allstate in the instant case is similar to that used in *Blackburn*.

Here, Allstate's Selection/Rejection Form uses the precise wording contained in the Rate Bureau's form in its entirety. The only deviation from the promulgated form is Allstate's inclusion of additional language which explains uninsured and UIM coverage. There is no change or substantive amendment to the text of the Rate Bureau's form. The text of the Rate Bureau's form is completely legible, and the parties both stated on appeal that the text appears to be in ten point type. In contrast to the reduced font size of 5.5 in *Erie*, the reduction from twelve point to ten point type does not constitute such a significant reduction in font size as to impede the intent of the Rate Bureau and the Commission of Insurance to ensure that consumers make an informed decision on whether to select or reject UIM coverage. *See Blackburn*, 141 N.C. App. at 659, 540 S.E.2d at 65. The purpose of the statute itself is to ensure that innocent persons are compensated for injuries caused by underinsured motorists. *See Williams v. Holsclaw*, 128 N.C. App. 205, 211, 495 S.E.2d 166, 170, *aff'd*, 349 N.C. 225, 504 S.E.2d 784 (1998); *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 492, 473 S.E.2d 427, 429 (1996). We specifically decline to determine today, however, whether a fur-

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ther reduction in font size would frustrate the purpose of strict compliance with the Rate Bureau's form.

In addition, the form utilized by Allstate is not included as a smaller section of a larger form, and has not been reduced to a drastically small portion of the larger page. Therefore, its format does not conflict with *Erie. Erie*, 160 N.C. App. at 223, 584 S.E.2d at 861.

Therefore we hold the trial court's grant of summary judgment in favor of unnamed defendant Allstate was proper.

Affirmed.

Judges McGEE and McCULLOUGH concur.

KAREN E. LAUTERBACH, PLAINTIFF v. BRYAN J. WEINER, DEFENDANT

No. COA05-187

(Filed 18 October 2005)

1. Civil Procedure— attorney fees—earlier offer—partial

A partial offer to distribute the marital residence was not sufficient to create a binding final judgment on all pending issues in an equitable distribution action, and N.C.G.S. § 1A-1, Rule 68 pertaining to costs and attorney fees when an offer of judgment is unaccepted did not apply.

2. Divorce— equitable distribution—attorney fees—no statutory authority

Statutory authority to tax costs in equitable distribution cases does not exist in North Carolina (with an exception not applicable here). The trial court did not have authority to award attorney fees on the issue of whether an equitable distribution judgment finally obtained was more favorable than plaintiff's earlier offer.

Appeal by plaintiff from order entered 13 August 2004 by Judge Alonzo B. Coleman, Jr., in Orange County District Court. Heard in the Court of Appeals 21 September 2005.

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Donna Ambler Davis, P.C., by Donna Ambler Davis, for plaintiff-appellant.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for defendant-appellee.

TYSON, Judge.

Karen E. Lauterbach (“plaintiff”) appeals order denying her motion for costs including payment of attorney’s fees. We affirm.

I. Background

Plaintiff and Bryan J. Weiner (“defendant”) were married on 8 October 1994. One child was born of the marriage on 13 September 1998. The parties separated on 11 July 2001 and divorced on 5 November 2002.

On 24 April 2001, plaintiff filed a complaint seeking custody and child support, divorce from bed and board, post-separation support, alimony, an unequal distribution of the marital estate in her favor, and attorney’s fees. Defendant filed an answer and counterclaim on 18 June 2001. On 28 March 2002, plaintiff, the dependant spouse, served an offer of judgment (“offer”) pursuant to Rule 68 of the North Carolina Rules of Civil Procedure upon defendant, the supporting spouse. The offer was limited to the distribution of the marital residence. The offer would allow plaintiff to retain possession and ownership of the former marital residence in exchange for paying defendant a distributive award for his share of the equity in the residence. Defendant did not respond to the offer.

On 24 October 2003, the trial court entered an order that granted plaintiff sixty-nine percent and defendant thirty-one percent of the marital and divisible estate. The terms of the 24 October 2003 order reflect an unequal distribution in plaintiff’s favor. Plaintiff also received an award of attorney’s fees for custody and support in the amount of \$20,000.00.

On 2 March 2004, plaintiff filed an amended affidavit for attorney’s fees incurred from 28 March 2002, the date of service of the offer, through 25 February 2004, the date of the amended affidavit. The trial court denied plaintiff’s request and found as a matter of law that Rule 68 of the North Carolina Rules of Civil Procedure does not apply to costs and/or attorney’s fees associated with actions brought

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pursuant to N.C. Gen. Stat. §§ 50-20, 50-20.1, and 50-21 and those statutes related to the equitable distribution of marital property. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) finding as a matter of law that Rule 68 does not apply to costs and/or attorney's fees associated with actions brought pursuant to N.C. Gen. Stat. §§ 50-20, 50-20.1, and 50-21 and those statutes related to the equitable distribution of marital property; and (2) refusing to grant plaintiff's motion for costs including attorney's fees where the judgment finally obtained on 23 October 2003 was not more favorable to defendant than the offer served by plaintiff on 28 March 2002.

III. Rule 68

[1] Plaintiff argues Rule 68 applies to costs and/or attorney's fees associated with actions brought pursuant to N.C. Gen. Stat. §§ 50-20, 50-20.1, and 50-21 and those statutes related to the equitable distribution of marital property.

The Equitable Distribution Act, now codified as N.C. Gen. Stat. §§ 50-20 and 50-21, mandates marital estate property to be divided equally unless the court finds it is inequitable or unfair to do so. The Equitable Distribution Act lists twelve factors for a court to consider in determining whether an equal distribution is not equitable. Eleven of the factors are specific, while the twelfth factor allows the court to consider "any other factor which the court finds to be just and proper." N.C. Gen. Stat. § 50-20(c) (2003).

Rule 68 of the North Carolina Rules of Civil Procedure provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the

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judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C. Gen. Stat. § 1A-1, Rule 68(a) (2003).

“A purpose of Rule 68 is to encourage compromise and to avoid protracted litigation.” *Aikens v. Ludlum*, 113 N.C. App. 823, 824, 440 S.E.2d 319, 320 (1994) (citing *Scallion v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *disc. rev. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982)). A defendant who makes an offer of judgment has three options:

- 1) to specify the amount of the judgment and the amount of costs,
- 2) to specify the amount of the judgment and leave the amount of costs open to be determined by the court, or
- 3) to make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs.

Id. at 825, 440 S.E.2d at 321.

In *Mohr v. Mohr*, this court considered and rejected the use of Rule 68 offers of judgment in the context of child custody matters. 155 N.C. App. 421, 573 S.E.2d 729 (2002). *Mohr* was an issue of first impression for this court. *Id.* This court has not previously addressed the applicability of Rule 68 to actions for equitable distribution. Here, we need not rule on that issue. Plaintiff’s offer fails to satisfy the requirements of Rule 68.

The Rule requires the party who files an offer “to serve upon the adverse party an offer to allow judgment to be taken against him.” N.C. Gen. Stat. § 1A-1, Rule 68(a). Plaintiff’s offer related only to the distribution of the marital residence and failed to address or propose an offer for the division of the entire marital estate. Because “[t]he Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success,” the offer must create a binding final judgment. *Marek v. Chesny*, 473 U.S. 1, 5, 87 L. Ed. 2d 1, 7 (1985). By offering judgment only for distribution of the marital residence, plaintiff omitted any proposal for the division of the remaining marital estate and allowed the remaining separate and marital assets to be subjected to further litigation. Her partial offer to distribute the marital residence was insufficient to create a binding final judgment on all pending issues. Plaintiff’s assignment of error is overruled.

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[174 N.C. App. 201 (2005)]

IV. Final Judgment

[2] Plaintiff argues the trial court erred in refusing to grant plaintiff's motion for attorney's fees where the judgment finally obtained on 23 October 2003 was not more favorable to defendant than the offer served by plaintiff on 28 March 2002.

Rule 68 states, "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay *the costs incurred* after the making of the offer." N.C. Gen. Stat. § 1A-1, Rule 68 (emphasis supplied). "In North Carolina costs are taxed on the basis of statutory authority" under N.C. Gen. Stat. § 6-20. *Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815, *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 410 (1997). Generally, statutory authority to tax costs in equitable distribution cases does not exist in North Carolina. N.C. Gen. Stat. § 50-20(i) (2003) provides one exception:

(i) Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

Except for this narrow exception, inapplicable here, we find no statutory authority for the court to award attorney's fees under the issue before us. Plaintiff's assignment of error is overruled.

V. Conclusion

Plaintiff's offer addressed only the division of the marital residence, one aspect of the equitable distribution of the entire marital estate. Because plaintiff's offer was insufficient to create a binding final judgment, it was not possible for the trial court to compare plaintiff's offer with the order entered by the trial court. The trial court's order divided the equity in the marital residence along with all remaining marital and divisible property. The trial court did not err in refusing to grant plaintiff's motion for attorney's fees under Rule 68. N.C. Gen. Stat. § 1A-1, Rule 68. Rule 68 only allows for "the costs incurred." *Id.* No specific statutory provision allows for attorney's fees to be assessed as "the costs incurred" under the facts before us. "It is settled law in North Carolina that ordinarily attorney's fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *Records v.*

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Tape Corp. and Broadcasting System v. Tape Corp., 18 N.C. App. 183, 187, 196 S.E.2d 598, 602, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973). The trial court's order is affirmed.

Affirmed.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. WILLIAM T. MASON

No. COA04-1565

(Filed 18 October 2005)

1. Appeal and Error— preservation of issues—failure to raise double jeopardy at trial

Defendant's failure to raise double jeopardy as the basis of a motion to dismiss at trial precludes consideration of the assignment of error on appeal.

2. Constitutional Law— effective assistance of counsel—retrial on procedural error—failure to raise double jeopardy at trial—no error

A claim for ineffective assistance of counsel based on trial counsel's failure to argue that defendant's retrial was double jeopardy lacked merit because defendant could not show a reasonable probability that the indictment would have been dismissed had the motion been argued. Defendant may not be retried if the reversal was based upon the sufficiency of the evidence; here, the defect was procedural.

Appeal by defendant from judgment entered 9 June 2004 by Judge Jack W. Jenkins in Carteret County Superior Court. Heard in the Court of Appeals 8 June 2005.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Duncan B. McCormick for defendant-appellant.

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ELMORE, Judge.

William T. Mason (defendant) was indicted on 4 March 2002 for possession of a firearm by a felon and for being an habitual felon. A jury found defendant guilty of possession of a firearm by a felon, and defendant was also convicted of being an habitual felon. Defendant appealed, and this Court reversed and remanded defendant's convictions for a new trial in an unpublished opinion filed 20 January 2004. *See State v. Mason*, 162 N.C. App. 360, 590 S.E.2d 477 (2004) (unpublished opinion). The Court held that there was a fatal variance between the indictment and the evidence at trial as to the offense of possession of a firearm by a felon. *See id.* The indictment for possession of a firearm by a felon stated the prior crime as possession with intent to sell and deliver a counterfeit controlled substance, but upon the request of the State defendant stipulated to a prior felony of sale and delivery of a counterfeit controlled substance. *Id.*

During the 7 June 2004 criminal session of Carteret County Superior Court, defendant was tried again for the offenses of possession of a firearm by a felon and being an habitual felon. The State offered into evidence a certified copy of defendant's conviction for possession with intent to sell and deliver a counterfeit controlled substance. The jury returned a guilty verdict on the charge of possession of a firearm by a felon. Defendant entered a guilty plea on the charge of being an habitual felon. Judge Jack W. Jenkins sentenced defendant to a term of 80 months to 105 months imprisonment. Defendant gave notice of appeal in open court.

On 18 January 2005 defendant filed his Brief with this Court and a Motion to Amend Record on Appeal to include an additional assignment of error (ineffective assistance of counsel). The State did not oppose the motion to amend, and this Court allowed the motion on 31 January 2005.

Defendant raises two issues in the instant appeal: (1) whether defendant being retried for the same offenses after reversal by the Court of Appeals violated the Double Jeopardy Clause of the state and federal constitutions; and (2) whether the defense counsel's failure to make a motion to dismiss the indictment charging possession of a firearm by a felon on the basis of double jeopardy constituted ineffective assistance of counsel. We find no error.

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[1] Defendant concedes in his brief that defense counsel failed to raise the double jeopardy argument before the trial court.¹ Constitutional issues not raised before the trial may not be asserted on appeal. *See State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998). “The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by the defendant . . .” *State v. Hopkins*, 279 N.C. 473, 475-76, 183 S.E.2d 657, 659 (1971). Thus, “the double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court.” *State v. McKenzie*, 292 N.C. 170, 176, 232 S.E.2d 424, 428 (1977). Defendant’s failure to raise the double jeopardy violation as a basis for a motion to dismiss at trial precludes our consideration of his assignment of error on appeal. *See State v. Roope*, 130 N.C. App. 356, 362, 503 S.E.2d 118, 123, *disc. review denied*, 349 N.C. 374, 525 S.E.2d 189 (1998); *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999).

[2] By his other assignment of error, defendant sets forth a claim for ineffective assistance of counsel. Defendant contends that the failure of his trial counsel to move to dismiss the indictment for possession of a firearm by a felon on the ground that a retrial violated the prohibition against double jeopardy constituted ineffective assistance of counsel.

We determine that defendant’s claim lacks merit because he cannot show that there is a reasonable probability that the result of the trial would have been different, *see State v. Blackeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001), if trial counsel had made a motion to dismiss the indictment on double jeopardy grounds. Defendant appealed his convictions from the first trial and succeeded in having them reversed by this Court. Generally, the protection against double jeopardy does not bar a retrial for the same offenses that a defendant was convicted of if the defendant’s convictions were reversed on appeal based upon trial error. *See Burks v. United States*, 437 U.S. 1, 15-16, 57 L. Ed. 2d 1, 12-13 (1978); *Tibbs v. Florida*, 457 U.S. 31, 40-41, 72 L. Ed. 2d 652, 660 (1982). However, if reversal was based upon the sufficiency of the evidence, then the defendant may not be retried consistent with double jeopardy protection. *See Burks*, 437 U.S. at 18, 57 L. Ed. 2d at 14 (“the Double Jeopardy Clause precludes a second trial once the

1. Defendant made a motion to dismiss at the close of the State’s evidence, arguing that the State failed to show that defendant possessed a firearm. Defendant renewed this motion at the close of all evidence. However, defendant did not present the defense of double jeopardy.

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reviewing court has found the evidence legally insufficient”); *State v. Callahan*, 83 N.C. App. 323, 325, 350 S.E.2d 128, 129-30 (1986), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987).

Although a retrial based on a reversal due to trial error is not foreclosed by the Double Jeopardy Clause, it remains well-established that a retrial following reversal *based solely on evidentiary insufficiency* falls within the core of the double jeopardy protection. A reversal based on the legal insufficiency of evidence is, in effect, a determination that the government’s case was so lacking that the trial court should have entered a judgment of acquittal rather than submitting the case to the jury.

United States v. Akpi, 26 F.3d 24, 25 (4th Cir. 1994) (citing *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1 (1978)).

Here, the State erred during defendant’s first trial in asking for a stipulation from defendant to the crime of sale and delivery of a counterfeit controlled substance instead of possession with intent to sell and deliver a counterfeit controlled substance. Defendant appealed the trial court’s judgment entered on his two convictions to this Court and, as a result of this error, was successful in attaining reversal of those convictions. The mere fact that the State asked defendant to stipulate to a prior felony that did not correspond to the prior felony stated in the indictment does not render the error a substantive evidentiary one attributable to the State. Instead, the record reveals an intention by defense counsel, after conferring with defendant, to stipulate to a prior felony and an assumption by the State that this stipulation relieved it of the burden of establishing this element of the possession of a firearm by a felon charge. Under the unique circumstances here, the defect was a procedural one rather than a substantive evidentiary one. As such, the reversal of defendant’s convictions by this Court was not a decision that the State failed to establish defendant’s criminal culpability that would bar retrial on those offenses. *See Burks*, 437 U.S. at 15, at 57 L. Ed. 2d at 12 (reversal for trial error implies nothing about defendant’s guilt or innocence; retrial is not barred under double jeopardy principles). Defendant cannot show a reasonable probability that the indictment would have been dismissed if trial counsel had argued a motion to dismiss on double jeopardy grounds. We overrule defendant’s assignment of error regarding ineffective assistance of counsel.

No error.

Judges CALABRIA and GEER concur.

MABEE v. ONSLOW CTY. SHERIFF'S DEP'T

[174 N.C. App. 210 (2005)]

RONALD MABEE AND WIFE BEVERLY MABEE, PLAINTIFFS-APPELLANTS V. ONSLOW COUNTY SHERIFF'S DEPARTMENT, ED BROWN, IN HIS CAPACITY AS SHERIFF OF ONSLOW COUNTY, KIRK NEWKIRK, IN HIS CAPACITY AS A DEPUTY SHERIFF FOR THE COUNTY OF ONSLOW, SEVERAL UNKNOWN DEPUTY SHERIFFS IN THEIR CAPACITY AS DEPUTY SHERIFFS OF THE COUNTY OF ONSLOW, CHARLES J. ROBERTS, IN HIS INDIVIDUAL CAPACITY, DEFENDANTS-APPELLEES

No. COA04-1628

(Filed 18 October 2005)

Process and Service— service on sheriff and deputy—agent of clerk of court

Appellants did not comply with statutory requirements in serving a sheriff and a deputy because the deputy who executed service had not been designated as the agent of the clerk of court, as required by N.C.G.S. § 162-16.

Appeal by defendants from order entered 12 July 2004 by Judge Kenneth Crow in Onslow County Superior Court. Heard in the Court of Appeals 17 August 2005.

Jeffrey S. Miller for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, L.L.P., by Mark A. Davis, for defendants-appellees.

CALABRIA, Judge.

Ronald and Beverly Mabee (“appellants”) appeal the 12 July 2004 order granting a motion to dismiss with prejudice as to Ed Brown, Kirk Newkirk, and the Onslow County Sheriff’s Department (“appellees”). The trial court granted appellees’ motion citing insufficiency of service of process and lack of personal jurisdiction. We agree.

On 30 May 2000 and again on 27 June 2000, appellee Kirk Newkirk, Deputy Sheriff of Onslow County, North Carolina, and several other Onslow County deputies, investigated the private residence of appellants at 202 Crooked Creek Road, Jacksonville, Onslow County. On 28 May 2003, the appellants filed a complaint alleging, *inter alia*, the police work at their residence was an illegal trespass to private property, which terrorized them.

On 28 May 2003, the same day the complaint was filed, the deputy clerk of the Superior Court issued summonses to appellees. Subse-

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quently, Deputy Sheriff Roger Lanier purported to serve the summons and complaint on Onslow County, the Onslow County Sheriff's Department, Sheriff Ed Brown, and Deputy Sheriff Kirk Newkirk by delivering copies and returning the summons with the appropriate certifications.¹ The appellees answered the complaint and included a motion to dismiss. On 30 June 2004, Superior Court Judge Kenneth F. Crow granted appellees' motion to dismiss with prejudice all claims against them based upon insufficiency of process and lack of personal jurisdiction pursuant to North Carolina Rules of Civil Procedure 12(b)(2) and 12(b)(5). Appellants appeal.

Appellants contend that the court erred by granting appellees' motion to dismiss for insufficiency of service of process and lack of personal jurisdiction. Appellants argue that the statute appellees cited as grounds to support their motion to dismiss, N.C. Gen. Stat. § 162-16, was meant to benefit, not burden, a plaintiff attempting service of process upon a sheriff and his deputies. Moreover, appellants maintain the statute permits a deputy to serve his sheriff as well as his fellow deputies. We find this argument unavailing.

North Carolina General Statutes § 162-16 (2003) provides the exclusive means to effectuate service of process upon a sheriff and his deputies:

if the sheriff be a party, the coroner *shall* be bound to perform the service, as he is now bound to execute process where the sheriff is a party. . . . In those counties where the office of coroner has been abolished, or is vacant, and in which process is required to be served or executed on the sheriff, the authority to serve or execute such process *shall* be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to serve or execute the same.

(Emphasis added).

This Court has unequivocally stated that “[w]hen a statute prescribes the manner for proper notification, the summons *must be issued and served in that manner.*” *Johnson v. City of Raleigh*, 98 N.C. App. 147, 149, 389 S.E.2d 849, 851, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 176 (1990) (emphasis added). The requirements regarding

1. Plaintiffs-appellants voluntarily dismissed all claims against appellee Onslow County and admit that as to appellee Charles J. Roberts and appellees “unknown deputies” of Onslow County, service of process never occurred and the time for proper service has expired.

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adequate service of process “must be construed strictly and the prescribed procedure must be followed strictly” such that if the necessary procedures are not adhered to “there is no valid service.” *Greenup v. Register*, 104 N.C. App. 618, 620, 410 S.E.2d 398, 400 (1991). Finally, although “defective . . . service may be sufficient to give the party actual notification of the proceedings, such actual notice does not give the court jurisdiction over the party.” *Johnson*, 98 N.C. App. at 149, 389 S.E.2d at 851. *Accord Hunter v. Hunter*, 69 N.C. App. 659, 662, 317 S.E.2d 910, 911 (1984).

The appropriate means to effectuate personal service of process upon a sheriff or his deputies is provided in N.C. Gen. Stat. § 162-16. *See Goodwin v. Furr*, 25 F. Supp. 2d 713, 717-18 (M.D.N.C. 1998) (holding that a deputy sheriff cannot serve a fellow deputy sheriff because such an action fails to comply with N.C. Gen. Stat. § 162-16). In order to comply with the statute, appellants were required to deviate from the standard procedure for personal service of process provided for in Rule 4 of the North Carolina Rules of Civil Procedure.² Specifically, after appellants delivered the summons and complaint to the Onslow County Clerk of Superior Court, if they wished to have defendants personally served, they were required to ensure that only a coroner or, if no coroner, the clerk of court or his or her designee would serve the sheriff and deputies. In this case, Deputy Sheriff Roger Lanier served both Sheriff Ed Brown and Deputy Sheriff Kirk Newkirk; such service was improper since the clerk of court never designated Deputy Lanier as her agent to serve them. Appellants failed to comply with the requirements of N.C. Gen. Stat. § 162-16; therefore, the appellants were never properly served, and we affirm the trial court's dismissal.

Affirmed.

Judges ELMORE and GEER concur.

2. Rule 4 provides, with respect to personal service as opposed to substitute service, that “[t]he complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.”

IN RE EXPUNGEMENT OF KEARNEY

[174 N.C. App. 213 (2005)]

IN THE MATTER OF EXPUNGEMENT FOR GERALD WALKER KEARNEY, JR.

No. COA04-1396

(Filed 18 October 2005)

**Judges— retired judge—unfulfilled expungement order—
authority of current judge**

A superior court judge had jurisdiction to rule upon the State's motion to reconsider an expungement order that was originally issued by a now retired judge. N.C.G.S. § 1A-1, Rule 63.

Appeal by the State from orders entered 15 March 1994 by Judge William H. Freeman and 7 May 2004 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 17 August 2005.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

No brief filed for respondent-appellee.

CALABRIA, Judge.

The State appeals Gerald Walker Kearney, Jr.'s ("respondent") 15 March 1994 expungement order and 7 May 2004 order denying reconsideration of the order for expungement.¹ We reverse in part, affirm in part, and remand.

Respondent was charged with assault and battery and misdemeanor assault inflicting serious injury on 18 March 1990. On May 18, 1990, defendant was convicted of misdemeanor assault inflicting serious injury and the charge of assault and battery was dismissed.

Judge William H. Freeman ("Judge Freeman") signed an order to expunge both offenses, the assault and battery as well as the assault inflicting serious bodily injury conviction. This order directed the State Bureau of Investigation ("SBI") to expunge from SBI records all references to the charges and arrest in the instant case. On 16 October 1995 the Assistant Director of the SBI sent a letter to the trial court seeking a clarification of the 15 March 1994 order since it was not in full compliance with N.C. Gen. Stat. § 15A-146 (2003). The letter explained that although respondent qualified for an expungement

1. State v. Gerald Walker Kearney, Jr. was the original caption on the order for expungement. The Forsyth County file numbers correspond with the numbers assigned to respondent's misdemeanor files.

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of the assault and battery charge, he did not qualify for expungement of the assault inflicting serious bodily injury charge. Nearly ten years passed from the date of the SBI letter with no response from the trial court and no action taken on the 15 March 1994 expungement order by the trial court.

On 16 March 2004 the State filed a motion to reconsider the order for expungement before Forsyth Superior Court Judge William Z. Wood, Jr. ("Judge Wood") because the author of the original expungement order, Judge Freeman, had retired.² Judge Wood denied the State's motion, finding the court had no jurisdiction over the matter. The State filed a petition *for writ of certiorari* in this Court to review Judge Wood's order as well as Judge Freeman's order since jurisdiction for entry of an amended order of expungement "lies with the Superior Court." This Court granted review of both orders.

The State argues that both charges should not have been expunged. Criminal charges may be expunged pursuant to N.C. Gen. Stat. § 15A-146 only when that charge has been dismissed or the individual charged was found not guilty. *See* N.C. Gen. Stat. § 15A-146(a) (2003) (explaining that "[i]f any person is charged with a crime, either a misdemeanor or a felony . . . and the *charge is dismissed*, or a *finding of not guilty* or not responsible is entered, that person may apply to the court . . . for an order to expunge from all official records any entries relating to his apprehension or trial.") (emphasis added). Since respondent was convicted of assault inflicting serious bodily injury at the same time his assault and battery charge was dismissed, he was eligible for expungement under § 15A-146 only for the assault and battery charge, and the original order should be amended to reflect an expungement only for the assault and battery.

Judge Wood, in denying the State's motion to reconsider the order for expungement, stated that the Superior Court lacked jurisdiction. However, N.C. R. Civ. P. 63, in pertinent part, states:

[i]f by reason of . . . retirement . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed . . . after a . . . hearing is otherwise concluded, then those duties . . . may be performed: (1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district.

N.C. Gen. Stat. § 1A-1, Rule 63 (2003).

2. Judge Freeman presided as Resident Superior Court Judge from 1980 to 2000.

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Therefore, notwithstanding Judge Freeman's absence from the bench due to retirement, Judge Wood erred in denying the motion to reconsider Judge Freeman's expungement order for lack of jurisdiction because he is statutorily authorized to address the motion to reconsider the order for expungement and, in accordance with the dictates of N.C. Gen. Stat. § 15A-146(a), to amend Judge Freeman's 15 March 1994 order. We affirm that part of Judge Freeman's 15 March 1994 order granting expungement for the assault and battery charge and reverse that part of the order granting expungement for the assault inflicting serious bodily injury conviction with instructions for Judge Wood to amend accordingly.

Affirmed in part, reversed in part and remanded.

Judges ELMORE and GEER concur.

STATE v. MASSEY

[174 N.C. App. 216 (2005)]

STATE OF NORTH CAROLINA v. MARLON RIO MASSEY

No. COA04-1443

(Filed 1 November 2005)

1. Sexual Offenses— short-form indictments—minor victim—sufficiency of charges

The short-form indictments used to charge defendant with multiple counts of first-degree sexual offense with a child under thirteen, multiple counts of felonious sexual act with a minor over whom he assumed the position of parent residing in the home, and multiple counts of indecent liberties were not defective, because: (1) the first-degree sex offense indictments match the form required by N.C.G.S. § 15-144.2(b); (2) the sex offense in a parental role indictments match the language of N.C.G.S. § 14-27.7; (3) the indecent liberties indictments match the wording of N.C.G.S. § 14-202.1; and (4) the indictments were sufficient to inform defendant of the charges against him, and defendant has not shown deprivation of his ability to prepare a defense due to a lack of specificity in the indictments.

2. Indictment and Information— variance between allegation and proof as to time—child sex abuse—statute of limitations not involved

The trial court did not improperly instruct the jury on theories of guilt not alleged in indictments for sexual offenses against a child when the date and time periods in the instructions were not specified in the indictments because: (1) the fact that a crime was committed on a date other than that which is alleged in the indictment is not a fatal variance between allegation and proof where no statute of limitations is involved such as in child sex abuse cases; and (2) the trial court did not instruct on a different theory or under a different statute, and the indictments gave defendant sufficient notice of the charges against him.

3. Sexual Offenses— multiple crimes—instructions—elements

The trial court did not commit plain error in a prosecution for sexual offenses by a person in a parental role and indecent liberties by failing to specifically instruct the jury on the elements of each offense on each date alleged where the court gave the pattern jury instructions for the alleged sexual offenses by a person in a parental role and distinguished those counts by assigning

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them different locations according to the victim's testimony, and the court also gave the pattern jury instructions for indecent liberties and then repeatedly instructed the jury that it had to find "separate and distinct acts" for the various counts.

4. Constitutional Law— right to unanimous verdict—multiple sexual offenses with child

Defendant's right to a unanimous verdict was not violated with respect to convictions on five counts of first-degree sexual offense with a child under thirteen where the instructions and verdict sheets contained specific references to the date, act and location of each of the alleged acts, and it was possible from those references to determine which of defendant's five convictions correspond to the acts testified to at trial.

5. Constitutional Law— right to unanimous verdict—multiple sexual offenses in parental role

Defendant's right to a unanimous verdict was not violated with respect to convictions on two of the ten counts of sexual offense by a person in a parental role where there was sufficient evidence to support convictions for acts occurring in two different locations, and the trial court's disjunctive instruction allowed different sexual acts to be considered as alternate means by which the State proved a single offense. However, defendant's right to a unanimous verdict was denied with respect to convictions on eight counts of sexual offense by a person in a parental role where it is impossible to relate the charges in the verdict sheets to specific instances because the verdict sheets did not associate an offense with a given incident.

6. Constitutional Law— right to unanimous verdict—multiple indecent liberties offenses

Defendant's right to a unanimous verdict was denied with respect to convictions on four counts of indecent liberties, even though defendant was charged with only four counts of indecent liberties, where the State presented evidence of more than four incidents of indecent liberties; although the trial court instructed the jury to consider each count a separate and distinct act, the instructions made no further attempt to distinguish among the counts; and it is therefore impossible to determine whether each juror had in mind the same four incidents when voting to convict defendant.

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7. Sentencing— aggravating factors—failure to submit to jury—*Blakely* error

The trial court erred by imposing aggravated sentences on defendant for multiple counts of first-degree sexual offense with a child under thirteen, multiple counts of felonious sexual acts with a minor over whom he assumed the position of parent residing in the home, and multiple counts of indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense without submitting this finding to the jury, and defendant is entitled to a new sentencing hearing.

8. Sentencing— aggravating factor—consolidated judgment—most serious offense

The trial court did not improperly aggravate defendant's sentence by an aggravating factor based upon the same evidence used to prove an element of sexual offense by a person in a parental role where defendant's convictions for that offense were consolidated for judgment with convictions for first-degree sexual offense with a child under thirteen; aggravating factors applied to a sentence for a consolidated judgment apply only to the most serious offense in that judgment, which was the first-degree sexual offense; and defendant's sentence was thus not derived from sexual offense by a person in a parental role because it was not the most serious offense in the consolidated judgment.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgments entered 22 April 2004 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 2005.

Roy A. Cooper, III, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was convicted of five counts of first-degree sexual offense with a child under 13, ten counts of felonious sexual act with a minor over whom he assumed the position of parent residing in the

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home, and four counts of indecent liberties. These verdicts were consolidated for sentencing, and defendant received five consecutive sentences of a minimum of 275 months and a maximum of 339 months. After careful review of the record, we find no error as to defendant's conviction of five counts of first-degree sexual offense and two counts of felonious sexual act with a minor. However, we must reverse his remaining convictions of felonious sexual act with a minor and indecent liberties convictions, and remand the case for a new trial.

The State presented evidence at trial which tended to show the following: in July 2000, defendant moved in with H.J., her mother Rebecca, and half sister A.T. H.J. was six years old at that time. It was agreed that defendant would be treated as a stepfather. H.J. testified that when she was eight, in September 2002, shortly after the birth of her brother, defendant made her pull off her clothes and get in her mother's bed with him. He would turn her on her side and "stick his thing in [her] backside," and that this happened about twenty times. She testified that by "his thing" she meant defendant's penis.

She further testified that he would touch her breasts, that before he put "his thing" in her "backside" he would lick his fingers and touch her "backside," and that the same thing would happen in the living room as well as the bedroom. H.J. stated that he asked her to lick his penis, but she refused, and that he licked her breasts and on her "front part." She also explained that sometimes these acts also occurred in the living room on Sunday, when the race would be on television. H.J. testified that defendant licked her twice, but that it was not at the same time he was putting "his thing" in her "backside", but afterwards. She explained that her mom found out on 5 June 2003 when A.T. saw defendant "holding on to her", and told Rebecca, who then talked to H.J. Subsequently, H.J. talked to the sheriffs and went to the hospital for an examination.

Sara Ehlers Dentel, a forensic nurse examiner, testified that she completed a rape kit on H.J. and took photographs of H.J.'s vaginal and rectal areas. During her examination, she found what appeared to be bruising and ulcerations inside H.J.'s rectum consistent with H.J.'s statements.

Detective Arnette Miles testified that she interviewed H.J. regarding the allegations, and H.J. told her that defendant put "his thing" in her "backside" in the master bedroom; that he had licked her vagina twice; that, sometimes prior to placing "his thing" in her "butt," he

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would spit on his hands and digitally penetrate her; and that on several occasions defendant also did this in the living room on the couch. After taking this statement, Detective Miles testified that she traveled with two other officers to H.J.'s home, where they questioned defendant. After initially denying the allegations, they again asked defendant "if he did it," and defendant began to cry and nodded his head affirmatively.

Miles testified that defendant gave a statement that prior to 5 June 2003, he had sodomized H.J. at least six times. Miles explained that defendant stated that he had licked H.J. two or three times, that H.J. had licked his penis, but he could not remember how many times, and that sometimes this had taken place in the master bedroom and sometimes in the living room on the couch.

Agent Suzi Barker, forensic biologist with the State Bureau of Investigation, testified there was semen found on the panties worn by H.J. on 5 June 2003. Agent Brenda Bisset, a forensic DNA examiner, testified that the DNA profile from this semen matched the DNA profile obtained from defendant. Defendant offered no evidence.

On appeal, defendant brings forward assignments of error regarding 1) the sufficiency of the short form indictments; 2) the trial court's failure to completely instruct the jury concerning several of the counts in the indictments; 3) the trial court's instructions were based on theories not alleged in the indictments; 4) the deprivation of his constitutional right to jury unanimity due to jury instructions that resulted in ambiguous verdicts; and 5) the violation of his constitutional right to a jury regarding his sentencing in the aggravated range. We address each of these arguments in turn.

I.

[1] Defendant contends the short-form indictments returned in these cases were defective because they failed to allege all the essential elements of the charges. This argument is without merit. Indictments must be sufficient to put defendant on notice of the charges. *State v. Kennedy*, 320 N.C. 20, 24, 357 S.E.2d 359, 362 (1987). "An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. McGriff*, 151 N.C. App. 631, 634, 566 S.E.2d 776, 778 (2002) (internal citations omitted).

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In child sex abuse cases, due to the uncertainty of children regarding dates and times, courts are lenient regarding differences between alleged dates and those presented at trial. *Id.* at 635, 566 S.E.2d at 779. To show prejudice from such leniency, we require that defendants show a deprivation of their defense due to lack of specificity. *Id.* Moreover, even though short-form indictments do not list all of the elements of a particular crime, their use as charging instruments for statutory sex offense has been authorized by the legislature. *State v. Miller*, 159 N.C. App. 608, 613, 583 S.E.2d 620, 623 (2003), *aff'd*, 358 N.C. 133, 591 S.E.2d 520 (2004). “In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense,” and “need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged.” *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

Here, the first-degree sex offense indictments match the form required by N.C. Gen. Stat. § 15-144.2(b); the sex offense in a parental role indictments match the language of N.C. Gen. Stat. § 14-27.7; and the indecent liberties indictments match the wording of N.C. Gen. Stat. § 14-202.1. Therefore, they are sufficient to inform the defendant of the charges against him. In addition, defendant has not shown deprivation of his ability to prepare a defense due to a lack of specificity in the indictments. Accordingly, this assignment of error is overruled.

II.

[2] Defendant also maintains the trial court erred by instructing jury on theories of guilt not alleged in the indictment because the date and time periods in the jury instructions were not specified in the indictments. We disagree.

The fact that a crime was committed on a date other than that which is alleged in the indictment “is not fatal” and “a variance between allegation and proof as to time is not material where no statute of limitations is involved,” *Blackmon*, 130 N.C. App. at 697, 507 S.E.2d at 45 (internal citations omitted) (date range between 1 January and 12 September 1994), as long as the defendant has an opportunity to present an adequate defense. *McGriff*, 151 N.C. App. at 637, 566 S.E.2d at 780 (date between 1 December 1998 and 27 January 1999 not prejudicial).

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Here, the trial court did not instruct on a different theory, or under a different statute. *Cf. State v. Lawrence*, 170 N.C. App. 200, 206, 612 S.E.2d 678, 683 (2005), *temp. stay allowed*, 359 N.C. 640, 615 S.E.2d 662 (2005) (*Lawrence II*, a case unrelated to *Lawrence I*) (instruction based on theory that sex offense was against a victim under the age of 13, but indictments alleged theory of forcible offense); *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000) (holding that “the trial judge, by his failure to submit the proper jury instructions for the three counts of first degree (forcible) sexual offense against defendant, effectively dismissed those charges”). Since we have already determined that the indictments were sufficient to put defendant on notice of the charges against him, and since the lack of specificity as to time when dealing with child sex abuse cases is not fatal, this argument is overruled. *See, e.g., Blackmon*, 130 N.C. App. at 697, 507 S.E.2d at 46.

III.

[3] Defendant next argues that the trial court effectively dismissed the indictments by failing to completely and specifically instruct the jury as to certain counts. He maintains that the trial court failed to instruct the jury on the necessary elements for sex offense against a minor by a person in a parental role (counts two and three in 03 CRS 56202), and on the necessary elements of indecent liberties (count three in 03 CRS 56205 and count two in 03 CRS 56207).

“[A] trial judge who instructs on a different charge than the one defendant is indicted on, has essentially dismissed the indictment.” *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253 (instructing the jury on statutory sex offense when defendant indicted for forcible first-degree sex offense). The trial court, however, does not have to instruct on each count separately. *See State v. Parker*, 119 N.C. App. 328, 339, 459 S.E.2d 9, 15 (1995) (holding that trial court did not err in refusing to charge the jury separately on each count of the indictments, because considered contextually, the instructions made it clear that each charge should be considered separately). A “trial court’s failure to specifically instruct the jury as to the elements of each offense on each date . . . [is] not plain error.” *State v. Evans*, 162 N.C. App. 540, 544, 591 S.E.2d 564, 566 (2004).

Defendant did not object to the jury instructions at trial, and so alleges plain error. When a defendant alleges plain error, we must examine the whole record to determine if the error is so basic and prejudicial that it amounts to fundamental error, or whether the jury’s

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finding of guilt was influenced by the mistaken instruction. *State v. Carrigan*, 161 N.C. App. 256, 262-63, 589 S.E.2d 134, 139 (2003), *disc. review denied*, 358 N.C. 237, 593 S.E.2d 784 (2004).

For the first count complained of by defendant, the trial court instructed the jury following the pattern jury instruction for “felo-niously engaging in a sexual act, anal intercourse, in the master bedroom with a minor, over whom the Defendant had assumed a position of a parent residing in the home.” After reciting the pattern charge as to count one, locating the acts in the master bedroom, the trial court stated:

As to count two, . . . the State must prove from the evidence beyond a reasonable doubt that the sexual act took place in the living room. If the State fails to prove that it took place in the living room then you must find the Defendant not guilty. As to count three of this charge, the State again has the burden of proving that this sexual act took place in the master bedroom. If the State fails to prove this from the evidence beyond a reasonable doubt then you must find the Defendant not guilty.

Regarding three of the counts of indecent liberties, counts two and three of 03 CRS 56205 and count two of 03 CRS 56207, the trial court again gave the pattern jury instruction, and then instructed:

As to count three of case No. 03 CRS 56205, again, you must determine whether or not the Defendant is guilty of taking indecent liberties with a child. You must consider this as a separate and distinct act, separate from the other charges in this case. I’ve defined . . . the charge of taking indecent liberties with a child and . . . if you find that the State has proved this [sic] these three things from the evidence beyond a reasonable doubt then it would be your duty to return a verdict of guilty of this count three of case No. 03 CRS 56205. However, . . . if you have a reasonable doubt as to one or more of those things then it would be your duty to return a verdict of not guilty. But the law is the same, I’m not going to go through it again as to that.

Concerning 03 CRS 56207, counts one and two, the trial court instructed that each count must be considered a separate and distinct act and informed the jury that they would “also consider the same law as to count two. I’m not going to go through the definition of an indecent liberty again, you have heard it twice, but apply that law to count two, decide that as a separate and distinct act.” Moreover, before the

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final mandate, the trial court noted that the State bore the burden of proof, and “in an abundance of caution,” reiterated the importance of considering each count of each case as a separate and distinct act.

The trial court did not commit plain error by refusing to specifically reiterate the instructions for each factually similar offense on a different date. *Evans*, 162 N.C. App. at 544, 591 S.E.2d at 566. Nor do we believe that had the trial court specifically instructed the jury on each count, the jurors would have reached a different result. *Carrigan*, 161 N.C. App. at 263, 589 S.E.2d at 139. The trial court gave the pattern jury instructions for the alleged sex offenses in a parental role, and distinguished those counts by assigning them different locations, according to H.J.’s testimony. The trial court also gave the pattern jury instructions for indecent liberties and then repeatedly instructed the jury that it had to find “separate and distinct act[s]” for the various counts. Any error in these instructions does not rise to the level of plain error, and this assignment of error is overruled.

IV.

Defendant next argues that his right to a unanimous verdict was violated because it is unclear which criminal offenses the jury believed he committed. There is some merit to these contentions. Under the North Carolina Constitution, “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.” N.C. Const. art. 1, § 24; N.C. Gen. Stat. § 15A-1237(b) (2003). Jury instructions that allow the jury to convict a defendant without requiring unanimity on the issue of which criminal offense the defendant committed may compromise the right to a unanimous verdict. *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433, *disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999). “[A] disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either of which is itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.” *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991). When the defendant presents a question of jury unanimity, we examine the evidence, the charge, the instructions and the verdict “to determine whether any ambiguity as to unanimity has been removed.” *Petty*, 132 N.C. App. at 461-62, 512 S.E.2d at 434.

There is “no violation of a defendant’s right to a unanimous verdict unless the evidence reveals a greater number of separate criminal offenses than the number of charges submitted to the jury.” *State*

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v. Lawrence, 165 N.C. App. 548, 560, 599 S.E.2d 87, 96, *temp. stay allowed*, 359 N.C. 73, 603 S.E.2d 885 (2004), *disc. review allowed*, 359 N.C. 413, 612 S.E.2d 634 (2005) (*Lawrence I*) (“neither the indictments, verdict sheets, nor the trial court’s instructions, associated a given verdict sheet or indictment with any particular incident”); *State v. Wiggins*, 161 N.C. App. 583, 592-93, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004) (no unanimity problem where jury instructions and verdict sheets differentiated by applicable indictment number). Furthermore, our Supreme Court has found no error where “the trial judge submitted a specific instruction with respect to unanimity of verdict as to each indictment and also assigned correlating specific alleged acts of sexual offense to each indictment.” *Kennedy*, 320 N.C. at 25, 357 S.E.2d at 362.

[4] Defendant was convicted of five counts of first-degree sexual offense with a child under thirteen, ten counts of felonious sexual act with a minor over whom he assumed the position of a parent residing in the home, and four counts of indecent liberties. We begin by addressing the charges of first-degree sexual offense. First-degree sexual offense is “a sexual act: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]” N.C. Gen. Stat. § 14-27.4(a)(1) (2003). A “sexual act” includes “cunnilingus . . . [and] the penetration, however slight, by any object into the genital or anal opening of another person’s body[.]” *Id.* § 14-27.1(4).

An examination of the record reveals that the jury instructions and verdicts contain specific references to the date, act, and location of the alleged acts. From these references, it is possible to determine which of defendant’s five convictions correspond to the possible acts testified to at trial.

In 03 CRS 56199, defendant was found guilty of three counts of first-degree sexual offense. The verdict sheet reflects that the first conviction was for acts occurring “on June 5, 2003” and the jury instruction includes both this date and the specific act—anal intercourse. This instruction was supported by trial testimony that on 5 June 2003, H.J.’s sister saw defendant “holding on” to H.J. The second conviction was for a first-degree sexual offense “in the living room between 9-4-02 and 6-4-03” and the jury instructions also include this date range, location, and specific sexual act. H.J. testified that the many of the possible acts had occurred in the living room. The third count was identical to the second except that the location on the verdict sheet and in the instructions was the master bedroom; there was

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corresponding testimony from H.J. that some offenses had occurred in the bedroom.

In 03 CRS 56200, defendant was found guilty of first-degree sexual offense by cunnilingus and the trial judge properly referenced this in his instructions. H.J. testified that defendant licked her on her “front part,” and defendant himself stated that he had licked H.J. on several occasions. The risk that the jury would confuse this charge of first-degree sexual assault by cunnilingus with the previous counts was obviated by the trial court’s instructions that as to the previous incidents, “a sexual act means anal intercourse.” Furthermore, H.J. testified that defendant licked her at a different time than defendant sodomized her.

Finally, defendant was found guilty of first-degree sexual offense “in the living room while the Defendant was watching the race.” Both the jury instructions and H.J.’s testimony reference the race on television at the time of this offense. Again, this count is distinguishable from the earlier count of first-degree sexual offense “in the living room.” H.J. testified to multiple acts, some of which occurred in the living room. Defendant also stated that the alleged acts sometimes took place in the living room. The testimony and jury instructions indicate multiple acts in the living room, one of which took place while a race was on television.

In sum, the charges in the verdict sheet can be related to specific acts, each of which was the basis for a charge of first-degree sexual offense. These instances are not alleged to have occurred within the same “transaction” but, rather, were separate and distinct acts occurring at different times and places, each of which forms “the basis for charging the defendant with a separate count of first-degree sexual offense.” *Lawrence II*, 170 N.C. App. at 210, 612 S.E.2d at 685. Additionally, the trial court’s instructions limited the jury’s consideration of the first-degree sexual offenses by date, act, and location as reflected by the testimony and verdict sheets. Given the longstanding presumption that a jury follows the instructions given by the trial court, *see, e.g., State v. Wiley*, 355 N.C. 592, 637, 565 S.E.2d 22, 52 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003), and based on the foregoing analysis of the verdict sheets, jury instructions, and testimony, we can determine that the jury unanimously convicted defendant of particular crimes. *Kennedy*, 320 N.C. at 25, 357 S.E.2d at 362. We affirm defendant’s convictions for five counts of first-degree sexual offense.

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[5] Defendant was also convicted of ten counts of felonious sexual act with a minor over whom he assumed the position of parent residing in the home in violation of N.C. Gen. Stat. § 14-27.7(a). Since the nature of the verdict and the charge given to the jury on these counts differed significantly from the verdict and instructions pertaining to first degree sexual offense, we must grant defendant a new trial upon eight of these charges because, after examining the verdict sheets and the instructions, we cannot determine which specific acts each juror had in mind when voting to convict defendant of sex offense in a parental role. *Lawrence I*, 165 N.C. App. at 563, 599 S.E.2d at 98.

The proffered testimony was in the form of “generic testimony,” and “there is no apparent statutory or common law authority that would permit the return of more than one indictment based on the same generic testimony.” *Lawrence I*, 165 N.C. App. at 557, 599 S.E.2d at 94; *see also State v. Bates*, 172 N.C. App. 27, 35, 616 S.E.2d 280, 287 (2005) *temp. stay allowed*, 360 N.C. 67 — S.E.2d —, (2005) (generic testimony was sufficient to support a single additional charge and conviction of first-degree sexual offense); *Wiggins*, 161 N.C. App. at 593, 589 S.E.2d at 409 (upholding a conviction for second-degree rape based on generic testimony).

In this case, there was generic testimony about alleged incidents in the bedroom and living room, by anal intercourse and by cunnilingus. For example, H.J. testified about alleged acts that “would happen” and things that defendant “would” do “sometimes,” occurring in the living room and in the bedroom, and defendant made similar statements. This testimony is sufficient to support an additional charge and conviction of feloniously engaging in a sexual act in the master bedroom with a minor over whom defendant had assumed the position of a parent residing in the home by both cunnilingus and anal intercourse (count one of 03 CRS 56203), and a similar additional conviction for the same acts in the living room (count one of 03 CRS 56205). There is no issue as to unanimity because the disjunctive instruction allows these acts to be considered as alternate means by which the State proved the single criminal offenses. *Lawrence I*, 165 N.C. App. at 557, 599 S.E.2d at 94-95.

As to the eight remaining counts (three in 03 CRS 56202, two in 03 CRS 56203, and three in CRS 56204) where the jury found the defendant guilty of identical instances of anal intercourse in the master bedroom or living room, it is impossible to relate the charges in the verdict sheets to specific instances because the verdict sheets did not associate an offense with a given incident. *Id.* at 563, 599 S.E.2d

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at 98. Since we cannot determine whether the jury unanimously convicted defendant based on specific acts, we must grant a new trial upon the remaining eight counts of felonious sexual act with a minor.

[6] Finally, we examine defendant's convictions for indecent liberties. In 03 CRS 56205 and 03 CRS 56207, defendant was convicted of four counts of taking indecent liberties with a child.

A person is guilty of taking indecent liberties with children if, . . . he either:

- (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . for the purpose of arousing or gratifying sexual desire; or
- (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child . . .

N.C. Gen. Stat. § 14-202.1(a) (2003). It is well settled that indecent liberties do not merge with or are not lesser included offenses of sexual offense. *Lawrence II*, 170 N.C. App. at 214, 612 S.E.2d at 687. Furthermore, "evidence of one incident of rape or sexual offense may support a conviction for indecent liberties as well." *Id.* When there is evidence of a greater number of offenses than there are charges against a defendant, concerns over unanimity arise, *Lawrence I*, 165 N.C. App. at 558, 599 S.E.2d at 94, because there is a risk that the jury will return guilty verdicts without agreeing upon a defendant's guilt regarding particular criminal acts. *State v. Holden*, 160 N.C. App. 503, 507, 586 S.E.2d 513, 517 (2003), *aff'd without precedential value*, 359 N.C. 60, 602 S.E.2d 360 (2004).

Based on the record in this case, we are unable to ascertain which particular evidence was the basis for the jury's verdicts because, although defendant was only charged with four counts of indecent liberties, the State presented evidence of more than four incidents of indecent liberties. Defendant's own statement indicated that he had sodomized H.J. at least six times, that he licked her two or three times, and that H.J. had licked his penis an unknown number of times, and there was evidence of fondling and digital penetration as well. Although the trial judge instructed the jury to consider each count of indecent liberties a separate and distinct act, the instructions made no further attempts to distinguish among the counts. *Holden*, 160 N.C. App. at 508, 586 S.E.2d at 517. It is therefore impossible for us to determine whether each juror had in mind the same four incidents

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when voting to convict defendant. The risk of ambiguity as to unanimity has not been removed. *See Petty*, 132 N.C. App. at 461-62, 512 S.E.2d at 434 (distinguishing between disparate crimes and alternate ways of showing the commission of a crime). Since defendant's right to a unanimous verdict has been jeopardized, we must grant a new trial upon the four convictions of indecent liberties as well.

V.

[7] Defendant's final argument is that the trial court erroneously found a factor in aggravation, violating his right to a jury trial pursuant to *Blakely v. Washington*, 542 U.S. —, 159 L. Ed. 2d 403 (2004). We agree. The trial court found as an aggravating factor that "defendant took advantage of a position of trust or confidence to commit the offense." A defendant's Sixth Amendment right to a jury trial is violated by judicial findings of such aggravating factors pursuant to North Carolina's Structured Sentencing Act, specifically N.C. Gen. Stat. § 15A-1340.16(a), (b), and (c). *State v. Lewis*, 172 N.C. App. 97, 107, 616 S.E.2d 1, 7-8 (2005). "Our North Carolina Supreme Court applied the rule in *Blakely* to our structured sentencing scheme and determined that "statutory maximum" is equivalent to "presumptive range." *Id.* Since a jury did not find the aggravating factor beyond a reasonable doubt, this constitutes structural error, reversible *per se*, under *State v. Allen*, 359 N.C. 425, 444, 615 S.E.2d 256, 267 (2005), and we must grant the defendant a new sentencing hearing.

[8] Defendant further maintains that the trial court erroneously aggravated his sentence because the aggravating factor was based on the same evidence used to prove an element of the offense of sexual activity in a parental role. This argument is misplaced. Defendant's sexual offense by a person in a parental role convictions were consolidated for judgment with the first-degree sex offense charges. Our Supreme Court held in *State v. Tucker*, that "the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will only apply to the most serious offense in that judgment." 357 N.C. 633, 637, 588 S.E.2d 853, 855 (2003).

Here, as in *Tucker*, the defendant's sentence was not derived from sexual offense by a person in a parental role because it was not the most serious offense in the consolidated judgment. *Id.* at 639, 588 S.E.2d at 857. Therefore, it was not erroneous to apply the aggravating factors to the consolidated judgment.

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03 CRS 56199—First-Degree Sexual Offense—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56199—First-Degree Sexual Offense—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56199—First-Degree Sexual Offense—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56200—First-Degree Sexual Offense—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56200—First-Degree Sexual Offense—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56203—Sex Offense—Parental Role—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56205—Sex Offense—Parental Role—No error in the trial, remanded for a new sentencing hearing.

03 CRS 56202—Sex Offense—Parental Role—New Trial

03 CRS 56202—Sex Offense—Parental Role—New Trial

03 CRS 56202—Sex Offense—Parental Role—New Trial

03 CRS 56203—Sex Offense—Parental Role—New Trial

03 CRS 56203—Sex Offense—Parental Role—New Trial

03 CRS 56204—Sex Offense—Parental Role—New Trial

03 CRS 56204—Sex Offense—Parental Role—New Trial

03 CRS 56204—Sex Offense—Parental Role—New Trial

03 CRS 56205—Indecent Liberties—New Trial

03 CRS 56205—Indecent Liberties—New Trial

03 CRS 56207—Indecent Liberties—New Trial

03 CRS 56207—Indecent Liberties—New Trial

Judge GEER concurs.

Judge BRYANT concurs in part and dissents in part in a separate opinion.

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BRYANT, Judge, concurring in part, dissenting in part.

I concur in the portion of the majority opinion finding no error as to defendant's conviction of five counts of first degree sexual offense and two counts of felonious sexual act with a minor. However, I disagree and therefore respectfully dissent from the majority opinion remanding for a new trial the remaining convictions consisting of eight counts of felonious sexual act with a minor (also referred to as sex offense in a parental role) and four counts of taking indecent liberties with a minor.

The majority opinion acknowledges the trial court did not err in its instructions to the jury as to the charges of sexual offense in a parental role and indecent liberties. The trial court used the pattern jury instructions and distinguished by location each of the counts of sexual offense in a parental role and repeatedly instructed the jury it must find "separate and distinct acts" for each of the counts of indecent liberties.

Nevertheless, the majority, finding merit in defendant's contention that his right to a unanimous jury verdict "was violated because it is unclear which criminal offenses the jury believed he committed", goes on to hold that because "we cannot determine which specific instances of abuse each juror had in mind when voting to convict defendant", defendant must be granted a new trial on eight of the counts of sex offense in a parental role and on all four counts of indecent liberties. The majority seems to draw a distinction between those counts in which the verdict sheets indicate a specific incident (e.g. anal intercourse in the master bedroom) and counts where no other information is listed on the verdict sheets. However, our "statutes do not specify what constitutes a proper verdict sheet[,] . . . [n]or have our Courts required the verdict forms to match the specificity expected of the indictment." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240-41 (2002). A verdict is deemed sufficient if it "can be properly understood by reference to the indictment, evidence and jury instructions." *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd*, 319 N.C. 392, 354 S.E.2d 238 (1987) (per curiam).

Defendant was convicted of five counts of first degree sexual offense, four counts of indecent liberties and ten counts of felony sex offense in a parental role. The evidence at trial showed that from mid September 2002 (less than one month after the child victim's younger brother was born) until 5 June 2003, the defendant engaged in anal

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intercourse with the child victim, his step daughter, as many as fifty (50) times, “anytime he got a chance.” According to the child it happened as many as thirty times in the master bedroom and as many as twenty times in the living room. The evidence showed defendant licked his fingers and put them in the child’s backside prior to anal intercourse. The evidence further showed the defendant on at least one occasion touched her breast and licked her breast, and at least three times, licked her vaginal area. The jury heard evidence of defendant’s statement admitting to engaging in anal intercourse with the victim “at least six times before 5 June 2003,” and to licking her vagina “at least two or three times.” On 5 June 2003, after the victim’s sibling saw defendant “holding” the child victim, the child was taken to the doctor, examined and determined to have anal bruising and anal ulcerations. Fluid found on the back side of the victim’s panties was identified as sperm, subjected to DNA analysis, and determined to be that of the defendant.

I would submit that this evidence is more than sufficient to support each and every jury verdict in this case. The majority opinion and some of the cases cited therein seem to suggest that where, as here, the evidence reveals a greater number of separate criminal offenses than there are charges submitted to the jury, there is in essence, a per se violation of defendant’s right to a unanimous jury. *See State v. Bates*, 172 N.C. App. 27, — S.E.2d — (2005) *temp. stay allowed*, 360 N.C. 537, — S.E.2d —, 2005 N.C. LEXIS 861 (2005) and *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (J. Bryant concurring in part and dissenting in part) *temp. stay allowed*, 359 N.C. 640, 615 S.E.2d 662, 2005 N.C. LEXIS 604 (2005). Analyzing criminal cases in this manner would tend to extend the concept of unanimity far beyond what is reasonable for child sexual abuse cases in general and in this case in particular. Here we have a jury that was properly instructed by the court. During deliberations, this jury made only one request for testimony regarding one incident. The jury deliberated less than two hours before reaching unanimous verdicts on nineteen of twenty counts of sexual acts upon the child victim. Absent any indication the jury was confused or misunderstood the trial court’s instructions I cannot agree to overturn these unanimous jury verdicts which overwhelmingly appear to be based on the evidence presented at trial and on properly given instructions. The courts properly presume that jurors pay close attention to the instructions of the trial judge in criminal cases and that they “undertake to understand, comprehend, and follow the instructions as given.” *State v. Nicholson*,

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355 N.C. 1, 60, 558 S.E.2d 109, 148, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (citation omitted). As our Supreme Court has stated, “these instructions, when read as a whole, required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that the defendant engaged in an unlawful sexual act . . . [and there is] nothing in the record indicat[ing] any confusion, misunderstanding, or disagreement among the members of the jury which would indicate a lack of unanimity.” *Hartness*, 326 N.C. at 565, 391 S.E.2d at 179.

...

In the instant case defendant has failed to show a lack of unanimity in the jury verdicts. There must be more than a “possibility of a non-unanimous verdict” to overturn a unanimous jury verdict. We cannot decide cases based on speculation of what might have been. Perhaps the greatest danger posed by the majority opinion is that it would allow a convicted defendant to speculate on appeal, as to what a jury might have done during the course of deliberations at trial and with no indication the jury struggled with unanimity issues, grant defendant a new trial based on speculation. The burden is on defendant to show prejudicial error in order to have his conviction reversed and a new trial granted. Here, the evidence of record shows the jury was instructed on the law by the trial court, the jury was presented with a total of [20] separate verdicts [] as to three specific types of sexual crimes . . . and in a [very] short time the jury convicted defendant [of 19 of the 20 counts] in unanimous verdicts.

State v. Lawrence, 170 N.C. App. at 222, 612 S.E.2d at 691-92 (Bryant, J., dissenting).

Just as in *Lawrence*, I cannot find that a danger of lack of unanimity arises from the verdicts in the instant case. I believe this defendant received a fair trial, free from prejudicial error as rendered by a unanimous jury in open court. I would hold no error as to all convictions in this case, including all counts of Sexual Offense in a Parental Role and Taking Indecent Liberties with a Minor.

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IN THE MATTER OF: B.D.

No. COA03-1599-2

(Filed 1 November 2005)

1. Appeal and Error— preservation of issues—failure to argue

All original assignments of error not argued in either respondent's brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. Termination of Parental Rights— jurisdiction—failure to serve summons on minor child

The trial court did not lack jurisdiction in a termination of parental rights case based on an alleged failure to serve a summons on the minor child when the summons required by N.C.G.S. § 7B-1106(a)(5) was served upon the guardian ad litem's attorney advocate rather than the guardian ad litem, because: (1) assuming arguendo that this procedure was error, the guardian ad litem did not object at trial to the sufficiency of service, nor does the guardian ad litem argue on appeal that the trial court lacked jurisdiction over the minor child; and (2) respondent parents are unable to demonstrate any prejudice arising from the alleged failure to properly serve the minor child.

3. Termination of Parental Rights— holding special proceeding immediately prior to termination hearing—notice

The trial court did not err in a termination of parental rights case by holding the special hearing required by N.C.G.S. § 7B-1108(b) immediately prior to commencement of the termination hearing without giving respondents notice ten days prior to the hearing, because: (1) both respondents denied all the material allegations of the petition in their answers thereby indicating that each of the grounds for termination alleged in the petition were in dispute; (2) as there were no issues remaining for the trial court to dispose of at the special hearing, neither respondent suffered prejudice as a result of the failure to notify respondents of the special hearing ten days prior to its commencement; and (3) the trial court inquired as to the parties' surprise and ability to prepare an adequate defense considering the absence of notice regarding the special hearing, and both parties indicated they were ready to proceed.

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4. Termination of Parental Rights— jurisdiction—failure to attach copy of custody order to petition—notice

The trial court did not lack jurisdiction in a termination of parental rights case based on petitioner's failure to attach to the petition a copy of the custody order regarding the minor child, because: (1) although the Court of Appeals has recently concluded that a failure to attach a custody order results in a facially defective petition which fails to confer subject matter jurisdiction upon the trial court, the Court of Appeals is bound by precedential authority of its prior decisions and should not have created a conflicting line of cases to resolve; (2) there was no indication that respondent parents were unaware of the minor child's placement at any point during the case; and (3) respondents were unable to demonstrate any prejudice arising from petitioner's failure to attach the pertinent custody order to the petition.

5. Termination of Parental Rights— jurisdiction—pending appeal of a custody order

The trial court did not lack jurisdiction in a termination of parental rights case even though issues arising out of a prior adjudication and disposition of abuse and neglect were currently pending before the Court of Appeals, because our Supreme Court has recently concluded that the pending appeal of a custody order does not deprive a trial court of jurisdiction of termination proceedings.

6. Evidence— testimony—pediatric doctor—nurse practitioner—sexual abuse

The trial court did not err in a termination of parental rights case by allowing a pediatric doctor and nurse practitioner to testify regarding the minor child's alleged sexual abuse, because: (1) the Confrontation Clause is inapplicable to termination proceedings since such proceedings are civil actions where the right to be present, to testify, and to confront witnesses is subject to due limitations; (2) the trial court continually reminded counsel that it would not consider the minor child's statements to the doctor and nurse for the purpose of establishing the truth of the matter asserted therein, but rather for the purpose of establishing the basis of their determinations; (3) despite her absence from the minor child's examination, the trial court did not err by allowing the doctor to testify regarding her determination; and (4) the record reflects that neither the doctor or nurse based their deter-

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minations solely upon what the minor child stated in his interviews, but instead both witnesses described the various bases used in reaching their determinations including reports from other sources which detailed the minor child's sexualized behavior, poor social boundaries, and medical history.

7. Evidence— trial court instruction to attorney on how to elicit evidence or admissible testimony—plain error analysis inapplicable—failure to object

The trial court did not err in a termination of parental rights case by repeatedly and very specifically instructing petitioner's attorney during her case-in-chief on how to elicit evidence or admissible testimony, because: (1) the plain error rule has not been expanded to civil cases in general or to child custody cases in particular; and (2) there is no indication that respondent mother ever objected at trial to the alleged biased or prejudicial actions of the trial court, and a review of the record revealed no such bias or prejudice.

8. Termination of Parental Rights— findings of fact—refusal to sign release form related to treatment

The trial court did not err in a termination of parental rights case by finding as fact that respondent father refused to sign a release form related to his treatment at a local hospital, because there was sufficient evidence supporting this finding including that the social worker assigned to this case testified that: (1) respondent father made it very clear that nobody could subpoena his records from the Veteran's Administration Hospital; (2) there was no indication respondent was receiving the type of counseling ordered by the trial court; and (3) the social worker was unable to ascertain the type of counseling respondent allegedly received at the hospital since her efforts to contact the doctor who was treating respondent were met with a stone wall.

9. Termination of Parental Rights— grounds—willfully left child in foster care without demonstrating reasonable progress

The trial court did not err by concluding that sufficient grounds existed to terminate respondent father's parental rights including that respondent willfully left the minor child in foster care for more than twelve months without demonstrating any reasonable progress under the circumstances to correct those conditions which led to the minor child's removal, because: (1) the

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findings of fact establish that respondent had the ability as well as several opportunities to comply with trial court orders to demonstrate that he was willing to make an effort to correct those conditions leading to the minor child's removal, but respondent was instead hostile and noncooperative for the duration of the underlying juvenile case and he failed to follow through with individual therapy or other additional treatment for his mental health diagnosis in order for reunification efforts to move forward or to show the court his ability to exercise good judgment; and (2) respondent failed to accept any responsibility for the minor child's behavior problems or for failing to obtain counseling for the minor child.

10. Termination of Parental Rights— best interests of child— no showing of abuse of discretion

The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in the minor child's best interests to terminate parental rights, because respondents failed to demonstrate that they would provide care that promotes the minor child's healthy and orderly physical and emotional well-being.

Judge TIMMONS-GOODSON submitted this opinion for filing prior to 31 October 2005.

On remand based upon an order of the Supreme Court filed 18 August 2005 which remanded this case to this Court for reconsideration of its prior decision in light of *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005). Appeal by respondents from order entered 20 January 2003 by Judge Patricia Kaufmann Young in Buncombe County District Court. Originally heard in the Court of Appeals 20 September 2004. The following opinion supercedes and replaces the opinion filed 19 April 2005.

Renea S. Alt for petitioner-appellee Buncombe County Department of Social Services.

Judy N. Rudolph for guardian ad litem-appellee.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for respondent-appellant mother.

David A. Perez for respondent-appellant father.

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TIMMONS-GOODSON, Judge.

Respondent-mother and respondent-father (collectively, “respondents”) appeal the trial court order terminating their parental rights to their adopted son, Brian.¹ For the reasons discussed herein, we affirm the order of the trial court.

The facts and procedural history pertinent to the instant appeal are as follows: On 8 November 2000, Buncombe County Department of Social Services (“petitioner”) filed a petition against respondents, alleging that respondent-father was allowing Brian to sit on his lap while he drove a motorized and reflector-less wheelchair on Highway 70 in Asheville, North Carolina, in the dark hours of early morning. Following an adjudication and disposition hearing, the trial court entered an order on 19 March 2001 adjudicating Brian neglected and granting custody to petitioner. On 19 June 2001, petitioner filed a second petition against respondents, alleging that respondents engaged in “sexual games” with Brian and encouraged him to urinate and defecate upon them, their cats, and their residence. Following an adjudication and disposition hearing, the trial court entered an order on 20 February 2002 adjudicating Brian neglected and abused.

Respondents appealed the 20 February 2002 order to this Court. In an unpublished opinion filed 2 September 2003 (“*B.D. I*”), this Court affirmed the trial court order. On 1 November 2002, while *B.D. I* was pending, petitioner filed a petition to terminate respondents’ parental rights, alleging that Brian was neglected and that respondents had willfully left Brian in foster care for more than twelve months without showing any reasonable progress under the circumstances to correct those conditions which led to his removal.

The trial court held a hearing on the matter in February 2003. On 19 May 2003, the trial court entered an order terminating respondents’ parental rights. After recapitulating the evidence and findings from the prior adjudication hearings as well as the evidence from the termination hearing, the trial court found as fact that (i) respondents had failed to comply with court orders and recommended services, (ii) there had been no change in the circumstances since the 20 February 2002 adjudication of neglect, (iii) there is a reasonable probability of continuing neglect if Brian were returned to respondent’s care, and (iv) respondents had failed to demonstrate any reasonable progress to correct those conditions which led to Brian’s

1. For the purposes of this opinion, we will refer to the minor child by the pseudonym “Brian.”

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removal from their home. Based upon its findings of fact, the trial court concluded as a matter of law that sufficient grounds exist to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2). After concluding that it was in Brian's best interests to do so, the trial court ordered the release of Brian for adoption and the termination of respondents' parental rights. Respondents appeal.

[1] We note initially that, although their rights were terminated concurrently, respondents have filed separate appellate briefs with this Court. To the extent that their individual assignments of error present the same issue, we have chosen to address respondents' arguments together. Furthermore, where either respondent has failed to provide argument in their brief supporting an original assignment of error, we have deemed the omitted assignment of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2005). Accordingly, we limit our present review to those assignments of error properly preserved by respondents for appeal.

Respondents' Jurisdictional Arguments

[2] Both respondents argue that because Brian was not served with a summons, the trial court lacked jurisdiction to proceed with the termination hearing. We disagree.

Upon the filing of a petition to terminate parental rights, N.C. Gen. Stat. § 7B-1106(a)(5) (2003) requires that a summons regarding the proceeding be issued to the juvenile whose rights are to be terminated. "[T]he summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed[.]" *Id.* In the instant case, the record reflects that the summons required by N.C. Gen. Stat. § 7B-1106(a)(5) was served upon the guardian *ad litem*'s attorney advocate rather than the guardian *ad litem*. Assuming *arguendo* that this was error, we note that the guardian *ad litem* did not object at trial to the sufficiency of service, nor does the guardian *ad litem* argue on appeal that the trial court lacked jurisdiction over Brian. Instead, respondents object to the sufficiency of the service, arguing that the failure to properly serve Brian necessitates reversal of the trial court's termination order.

"Only a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1-271). "An aggrieved party

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is one whose rights have been directly and injuriously affected by the action of the court.” *Culton*, 327 N.C. at 625, 398 S.E.2d at 324. In the instant case, respondents are unable to demonstrate any prejudice arising from the alleged failure to properly serve Brian. Therefore, we are unable to conclude that respondents were “directly and injuriously” affected by the alleged error, and accordingly, we overrule this argument.

[3] Respondents also argue that the trial court erred by holding the special proceeding required by N.C. Gen. Stat. § 7B-1108(b) immediately prior to commencement of the termination hearing. Respondents assert that the failure to notify them of the special hearing ten days prior to its commencement was reversible error. We disagree.

When a respondent denies via answer any material allegation contained within a petition to terminate parental rights, N.C. Gen. Stat. § 7B-1108(b) (2003) requires that the trial court conduct a “special hearing . . . to determine the issues raised by the petition and answer” While we recognize that the statute provides that “notice of not less than 10 days nor more than 30 days” shall proceed the special hearing, *Id.*, we note that this Court has held that similar requirements under former N.C. Gen. Stat. § 7A-289.29(b) were “general,” and “[t]he fact that the hearing [i]s brief and held just prior to the trial does not conflict with the statutory requirements.” *In re Peirce*, 53 N.C. App. 373, 383, 281 S.E.2d 198, 204 (1981).

In the instant case, the record reveals that both respondents denied all the material allegations of the petition in their answers, thereby indicating that each of the grounds for termination alleged in the petition were in dispute. As there were no issues remaining for the trial court to dispose of at the special hearing, we are not persuaded that either respondent suffered prejudice as a result of the failure to notify respondents of the special hearing ten days prior to its commencement. Furthermore, we note that at the special hearing, respondent-mother’s counsel stated: “I did represent this morning that I am prepared for this hearing. I’ve read this file. I’ve been involved in this case for sometime, Your Honor, and know what the petition alleges.” Likewise, respondent-father’s counsel stated: “I can’t represent that we are harmed by it in any particular way by not having a special notice” These comments were elicited by the trial court, which, citing *In re Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990), inquired as to the parties’ “surprise” and ability to prepare an adequate defense considering the absence of notice regarding the

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special hearing. In light of the foregoing, we conclude that the trial court did not commit reversible error by holding the special hearing immediately prior to the termination hearing. Accordingly, this argument is overruled.

[4] Respondents also argue that the trial court was without jurisdiction to proceed with the termination hearing because petitioner failed to attach a copy of the custody order regarding Brian to the petition. We disagree.

Where a trial court places custody of the juvenile in some agency or person other than the parent, N.C. Gen. Stat. § 7B-1104(5) (2003) requires that a copy of the custody order be attached to a subsequent petition to terminate parental rights. In *In re Joseph Children*, 122 N.C. App. 468, 470 S.E.2d 539 (1996), the respondent assigned as error the petitioner's failure to attach a custody order to the petition and failure to satisfy the notice requirements of the termination statute. On appeal, this Court reviewed the record before it and determined that, because the petition satisfied the general notice requirements of N.C. Gen. Stat. § 1A-1, Rule 4(j1), "the discrepancy" in the petition was not so "material . . . as to result in any prejudice to the respondent." *Id.* at 471, 470 S.E.2d at 541. Similarly, in *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003), the respondent argued that the trial court lacked subject matter jurisdiction because the petitioner failed to comply with N.C. Gen. Stat. § 7B-1104(7), which requires that a petition state that it "has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act." On appeal, this Court concluded as follows:

[W]e find no authority that compelled dismissal of the action solely because petitioner failed to include this statement of fact in the petition. While it is a better practice to include the factual statement as stated in the statute, under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced as a result of the omission.

156 N.C. App. at 539, 577 S.E.2d at 426. Although we note that this Court has more recently concluded that failure to attach a custody order results in a "facially defective" petition which "fail[s] to confer subject matter jurisdiction upon the trial court[.]" *In re Z.T.B.*, 170 N.C. App. 564, 570, 613 S.E.2d 298, 301 (2005), we are persuaded by the reasoning as well as precedential authority of our prior decisions regarding the statute. See *In re Matter of Appeal from Civil Penalty*,

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324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”); *see also In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005) (citing *Civil Penalty* in resolving conflict in this Court regarding jurisdiction over termination proceedings and noting that a second panel of this Court should have followed a prior panel’s decision, “which [wa]s the older of the two cases. Had it done so, we would not have two conflicting lines of cases to resolve.”).

In the instant case, there is no indication that petitioner attached a copy of the custody order to the petition to terminate respondents’ parental rights. However, there is also no indication that respondents were unaware of Brian’s placement at any point during the case. The petition noted that “custody of [Brian] was given by prior orders” of the trial court, and it referenced the court file wherein those orders were entered. In his answer, respondent-father admitted that Brian was “in the legal custody of the Buncombe County Department of Social Services.” As detailed above, counsel for both respondents indicated at the termination hearing that they had been involved in the case for some time and had reviewed the trial court’s orders prior to the hearing. Various trial court orders in the record note that respondents were present at pre-termination hearings in which custody was granted to and continued with petitioner as well as those hearings in which visitation options were discussed and determined. In light of the foregoing, we conclude that respondents are unable to demonstrate any prejudice arising from petitioner’s failure to attach the pertinent custody order to the petition. Accordingly, we overrule this argument.

[5] Respondents further argue that the trial court was without jurisdiction to proceed with the termination hearing because issues arising out of a prior adjudication and disposition of abuse and neglect were currently pending before this Court. In a previous opinion in this case, *In re B.D.*, 169 N.C. App. 803, 611 S.E.2d 187 (2005) (“*B.D. II*”), this Court concluded that the trial court was without jurisdiction to terminate respondents’ parental rights while *B.D. I* was pending. However, our Supreme Court has recently concluded that “the pending appeal of a custody order does not deprive a trial court of jurisdiction over termination proceedings.” *R.T.W.*, 359 N.C. at 542, 614 S.E.2d at 491. In so concluding, the Supreme Court upheld this Court’s opinion in *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323,

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disc. review denied, 357 N.C. 506, 588 S.E.2d 472 (2003), in which the respondent's appeal of a neglect adjudication was dismissed as moot where a subsequent termination order was entered while the appeal was pending. In light of *R.T.W.*, we overrule respondents' final jurisdictional argument.

Respondents' Evidentiary Arguments

[6] Both respondents argue that the trial court erred by allowing a pediatric doctor and nurse practitioner to testify regarding Brian's alleged sexual abuse. Respondents assert that the witnesses' testimony and conclusions relied on improper bases and were thus inadmissible. We disagree.

The record in the instant case reflects that both Dr. Cynthia Brown ("Dr. Brown") and Certified Nurse Practitioner Elizabeth Osbahr ("Nurse Osbahr") testified at the termination hearing. Dr. Brown was received as an expert in pediatric medicine, and she testified that Brian's medical history, sexualized behavior, poor social boundaries, and use of sexualized language "fit a child who has been sexually abused." Nurse Osbahr testified that it was her "impression" that Brian had been "sexual[ly] abused, that he had bruising on his lower legs, and that there were behavior concerns."

We note that respondent-mother contends that Brian's statements to Dr. Brown and Nurse Osbahr were "hearsay statements," and that reference to the statements during their testimony violated her rights under the Confrontation Clause. Respondent-mother also contends that because Nurse Osbahr's testimony was received in order to corroborate Brian's later testimony, her testimony was inadmissible when petitioner failed to thereafter elicit testimony from Brian. This Court has recently concluded that the Confrontation Clause is inapplicable to termination proceedings, in that such proceedings are civil actions where "the right to be present, to testify, and to confront witnesses [is] subject to 'due limitations.'" ' " *In re D.R.*, 172 N.C. App. 300, 303, 616 S.E.2d 300, 303 (2005). Furthermore, in the instant case, the trial court continually reminded trial counsel that it would not consider Brian's statements to Dr. Brown and Nurse Osbahr for the purpose of establishing the truth of the matter asserted therein, but rather for the purpose of establishing the basis of their determinations. Although the trial court initially mentioned the possibility of "shifting gears" to allow Nurse Osbahr's testimony to be "corroborative as opposed to for the purpose of diagnosis and treatment," following extensive *voir dire* from all par-

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ties regarding the foundation for Nurse Osbahr's testimony, the trial court ruled only upon the admissibility of her testimony for substantive purposes and made no mention regarding its admissibility for corroborative purposes. Accordingly, we overrule these arguments from respondent-mother.

Respondents also contend that because Dr. Brown was not present when Brian was being interviewed and examined, her opinion regarding his potential abuse was based on an improper foundation. This Court has recently rejected a similar argument by the respondent in *In re Mashburn*, 162 N.C. App. 386, 591 S.E.2d 584, *appeal dismissed*, 359 N.C. 68, 603 S.E.2d 884 (2004). In *Mashburn*, the respondent-mother argued that an expert pediatrician's testimony was inadmissible because the child's statements forming the basis of her medical diagnosis were not made directly to her. This Court stated that "[w]hile [the witness] did not personally conduct the interviews of the children, and she testified to the content of both these interviews, [the petitioner] offered and this Court accepts that these statements are admissible under the ordinary course of business hearsay exception." 162 N.C. App. at 394-95, 591 S.E.2d at 590 (citing *In re Smith*, 56 N.C. App. 142, 148, 287 S.E.2d 440, 444 ("While it is true that the witnesses had no firsthand knowledge . . . when they assumed responsibility of the case, each had familiarized herself with the case history of the client based on the records kept by the department of social services . . . admissible under the business records exception to the hearsay rule."), *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982)).

In the instant case, the record indicates that rather than relying upon the business records exception, the trial court relied upon N.C. Gen. Stat. § 8C-1, Rule 703 in allowing Dr. Brown to testify. Rule 703 provides that an expert may testify regarding inadmissible facts and data made known to him or her "at or before the hearing" if the facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" N.C. Gen. Stat. § 8C-1, Rule 703 (2003). Here, Dr. Brown testified on *voir dire* regarding the "normal way" she reaches her conclusions regarding potentially abused children, indicating that she reaches her decision after receiving information and data reported by several agencies and individuals, including social workers, guardians *ad litem*, nurse practitioners, and in some cases, the children themselves. Dr. Brown testified that such methods are "true of medical evaluations in general," and that after compiling the pertinent infor-

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mation from various sources, she routinely fills out a form provided by the State which requires her to “use all the information provided” to reach a conclusion. In light of the foregoing, we conclude that, despite her absence from Brian’s examination, the trial court did not err by allowing Dr. Brown to testify regarding her determination.

Respondents maintain that because the conclusions of Dr. Brown and Nurse Osbahr were based solely upon Brian’s statements, they were inadmissible at the termination hearing. In support of this assertion, respondents cite *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff’d per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001) and *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 19 (2001), in which this Court concluded that where a medical professional’s determination is based solely upon a juvenile’s statements that he or she has been abused, the determination lacks a sufficient foundation and should not be admissible. Assuming *arguendo* that *Grover* and *Bates* apply to termination proceedings in addition to child sexual abuse trials, we conclude that their holdings are inapplicable to the instant case. Here, the record reflects that neither Dr. Brown nor Nurse Osbahr based their determinations solely upon what Brian stated in his interviews. Instead, both witnesses described the various bases used in reaching their determinations, including reports from other sources which detailed Brian’s sexualized behavior, poor social boundaries, and medical history. Accordingly, we overrule this argument.

Respondent-mother’s Individual Argument

[7] In addition to those arguments she shares with respondent-father, respondent-mother argues that the trial court erred by “repeatedly and very specifically instruct[ing] the attorney for [petitioner] during her case in chief on how to elicit evidence or admissible testimony[.]” Respondent-mother asserts that by “essentially hijack[ing] and tr[ying] the adjudication for [petitioner],” the trial court committed plain error. However, we note that to date, the plain error rule has not been expanded to civil cases in general or to child custody cases in particular. See *In re Gleisner*, 141 N.C. App. 475, 479, 539 S.E.2d 362, 365 (2000); *Raynor v. Odom*, 124 N.C. App. 724, 732, 478 S.E.2d 655, 660 (1996). Furthermore, in the instant case, there is no indication that respondent-mother ever objected at trial to the alleged biased or prejudicial actions of the trial court, and our review of the record reveals no such bias or prejudice. Accordingly, we overrule this argument.

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Respondent-father's Individual Arguments

In addition to those arguments he shares with respondent-mother, respondent-father argues that the trial court erred by: (I) finding as fact that he refused to sign a release form related to his treatment at a local hospital; (II) concluding that sufficient grounds exist to terminate his parental rights; and (III) concluding that it was in Brian's best interests to terminate his parental rights.

[8] Respondent-father first argues that the trial court erred by finding that he refused to sign a release form related to his treatment at a local hospital. Respondent-father asserts that the trial court's finding is not supported by sufficient evidence in the record. We disagree.

Where a respondent challenges the sufficiency of the evidence relied upon by a trial court in terminating his or her parental rights, "we look to see whether there is clear, cogent and convincing competent evidence to support the findings. If there is such competent evidence, the findings are binding upon us on appeal." *In re Allen*, 58 N.C. App. 322, 325, 293 S.E.2d 607, 609 (1982) (citations omitted). In the instant case, the trial court made the following pertinent finding of fact:

31. That after [respondents] completed their psychological evaluations, Ms. Rothard, Social Worker for the Department of Social Services, made referrals to Blue Ridge Mental Health Center for therapy. . . . [Respondent-father] refused to go to the intake appointment until after the second adjudication when he was reordered by the Court. When the second intake appointment was scheduled [respondent-father] attended [but] spent the first half hour refusing to be seen at Blue Ridge Adult Services. [Respondent-father] did not follow up with any therapy sessions thereafter with Blue Ridge. From 2001 to present, neither parent had received counseling through Blue Ridge. [Respondent-father] refused to go to Blue Ridge Mental Health because the records would be available to the Court. [Respondent-father] reported that he was being treated at the VA Hospital, however when he was asked to sign a release in order to verify the information, he refused. Ms. Rothard was never able to ascertain whether he received therapy at the VA Hospital. . . .

After reviewing the record in the instant case, we conclude that competent evidence supports this finding of fact. At the termination hearing, Janet Rothard ("Rothard") testified that she was a social

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worker assigned to Brian's case. Rothard testified that she accompanied respondent-father to Blue Ridge Adult Services following a prior neglect adjudication. Rothard testified that while at Blue Ridge Adult Services, respondent-father "spent about a half an hour refusing to be seen," but nevertheless subsequently "did an about-face and agreed that he would be willing to be seen." Rothard further testified that respondent-father did not attend the scheduled follow-up appointments, and in response to a question regarding the nature of "the VA support group," Rothard testified that respondent-father "made it very clear that the reason he did not choose to go to Blue Ridge and be a client there was because Blue Ridge records are available to the courts." Rothard explained as follows:

According to [respondent-father], the records from therapy at the Veteran's Administration Hospital are not available to the court. I requested several times that [respondent-father] would sign a release with the VA giving me the ability to speak with his therapist about his treatment. He gave me the name of the therapist. I called the therapist repeatedly. That therapist would never return my calls, and I never had the ability to talk to anyone at the VA. So whether he went or didn't go is not something I ever had the ability to know.

Respondent contends that this testimony does not support the trial court's finding of fact, in that it establishes "only" that Rothard requested that he sign a release and not that Rothard was unable to determine the nature and extent of the treatment. However, we note that Rothard further testified that respondent-father "made it very clear that we could never subpoena [his] records" from the Veteran's Administration Hospital, that there was no indication respondent-father was receiving "the type of counseling . . . ordered" by the trial court, and that she was unable to ascertain the type of counseling respondent-father allegedly received at the Veteran's Administration Hospital because her "efforts to contact . . . the doctor who was treating him met with a stone wall." In light of the foregoing, we conclude that sufficient evidence supports the trial court's finding of fact on this issue. Accordingly, we overrule this argument.

[9] Respondent-father next argues that the trial court erred by concluding that sufficient grounds exist to terminate his parental rights to Brian. Although respondent-father asserts that the trial court was without ample evidence to reach its ultimate conclusions regarding petitioner's allegations, notwithstanding that finding of fact discussed above, respondent-father fails to assign error to any specific findings

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of fact made by the trial court. "An order terminating parental rights will be upheld if there is clear, cogent, and convincing evidence to support the findings of fact and those findings of fact support the trial court's conclusions of law." *In re Clark*, 159 N.C. App. 75, 83, 582 S.E.2d 657, 662 (2003) (citation omitted). "[A] broadside exception that the trial court's conclusion of law is not supported by the evidence[] does not present for review the sufficiency of the evidence to support the entire body of the findings of fact. Instead, the trial court's findings of fact are binding on appeal, and we are left to determine whether the trial court's findings support its conclusion of law." *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001) (citations omitted).

In the instant case, the trial court concluded that sufficient grounds exist to terminate respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2). N.C. Gen. Stat. § 7B-1111(a)(2) (2003) provides that a trial court may terminate a respondent's parental rights upon concluding that the respondent "has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." A determination of willfulness does not require a showing that the parent was at fault. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). Instead, "[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

Here, it is undisputed that Brian has been in petitioner's custody with placement outside respondents' home since April 2001. Along with finding of fact thirty-one, the trial court made the following pertinent findings of fact in its termination order:

29. That Dr. Grandis performed a psychological evaluation on [respondent-father] on May 4, 2001. . . .

30. Dr. Grandis recommended that [respondent-father's] mental health be monitored closely. He further added that reunification should be contingent upon supports. Dr. Grandis believes it is important to rule out the possible disorders for safe parenting. Ruling out such disorders would require follow up therapy.

. . . .

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43. Ms. Rothard reported that following the allegations of sexual abuse in June 2001 [petitioner's] plan changed from reunification to adoption. . . . The Court continued to order [respondents] to comply with treatment recommendations.

. . . .

49. Ms. Rothard's last contact with [respondents] was in November 2002 at an agency review hearing. No changes by [respondents] had been made to ameliorate the risks outlined in the Risk Assessment.

. . . .

55. [Respondents] have a history of failing to comply with court orders and failing to cooperate with the services offered by [petitioner] and the Guardian ad Litem. Not only have services been recommended by [petitioner], but on numerous occasions the Court has ordered, repeatedly, as evidenced by the above outline of prior Court orders involving [Brian]. Counseling for [respondents] was deemed necessary for reunification efforts. The Court has repeatedly determined that counseling for [respondents] was in the best interests of [Brian]. . . . [Respondents] have repeatedly been defiant and uncooperative with Court orders and with [petitioner] beginning with the initial petition alleging child abuse and neglect, through the first and second adjudication orders, and later after each permanency and planning hearing.

56. Both [respondents] were ordered by the Court to obtain psychological evaluations and to follow all recommendations of the evaluations over two years ago on February 19, 2001, following the initial adjudication hearing. . . . The initial report made to [petitioner] involved [respondent-father] transporting [Brian] on his motorized wheelchair on Highway 70. Although that was the incident that led to the initial investigation and ultimate finding of neglect, the Court heard evidence and made findings that [respondents] refused to cooperate with the protection plan. The Court found that [respondent-father] became irate and threatened to get his gun in order to make a citizen[']s arrest. . . . [Respondents] refused to cooperate with obtaining psychological evaluations for themselves and for [Brian]. As well, [respondents] refused to cooperate with the referral for [Brian's] [developmental evaluation]. . . . The Court specifically found that [Brian] was removed from the home of [respondents] and placed in foster

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care because [Brian] was not enrolled in school, was not involved in counseling, had not had a psychological evaluation, [respondents] had failed to cooperate with [petitioner] in obtaining a psychological evaluation or enrolling [Brian] in counseling, and both parents refused to participate in psychological evaluations for themselves. . . . The Court ordered [respondents] to cooperate with the process to obtain psychological assessments and to comply with any recommendations of the assessments. Although [respondents] eventually had the psychologicals performed, neither has complied with treatment recommendations to date. Treatment was recommended in order to address [respondents'] ability to make proper parenting decisions and to address the anger and frustration directed toward [petitioner] and other authority figures. There is no evidence [respondents] have addressed their mental health diagnos[e]s. There is no evidence to support advancement in their mental health needs supporting their fitness to care for [Brian], as of the date of the termination hearing. [Respondents'] defiance in their own mental health needs strongly suggests their unwillingness and defiance to facilitate the necessary special treatment needs of [Brian].

These findings of fact establish that respondent-father had the ability as well as several opportunities to comply with trial court orders and demonstrate that he was willing to make an effort to correct those conditions leading to Brian's removal. Nevertheless, as noted by the trial court, respondent-father was instead "hostile and non-cooperative for the duration of the underlying juvenile case," and he failed to "follow through with individual therapy or other additional treatment for his mental health diagnosis in order for reunification efforts to move forward or [to show] the Court his ability to exercise good judgment" Respondent-father further "failed to accept any responsibility for [Brian's] behavior problems or for failing to obtain counseling for the minor child." In light of the foregoing, we conclude that the trial court's findings of fact support its determination that respondent willfully left Brian in foster care for more than twelve months without demonstrating any reasonable progress under the circumstances to correct those conditions which led to Brian's removal. As such a determination is sufficient in and of itself to justify termination of parental rights, we need not address respondent-father's arguments regarding the trial court's conclusion that he neglected Brian. *Clark*, 159 N.C. App. at 84, 582 S.E.2d at 663. Accordingly, we overrule this argument.

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[10] Respondent-father's final argument is that the trial court erred by concluding that it was in Brian's best interests to terminate his parental rights. We disagree.

When the petitioner succeeds in establishing the existence of any one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111, "the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C. Gen. Stat. § 7B-1110(a) (2003). Our review of the trial court's decision regarding the best interests of the child is limited to determining whether the trial court abused its discretion. *In re Allred*, 122 N.C. App. 561, 569, 471 S.E.2d 84, 88 (1996).

In the instant case, as detailed above, the allegations against petitioners involved particularly disturbing acts of neglect and abuse. After receiving evidence and hearing argument from both parties, the trial court determined that Brian has "special treatment needs" and requires placement "with custodians who recognize his needs for treatment and are willing to accept and follow through with recommendations." Recognizing that "[i]n order for [Brian] to succeed personally and academically he needs to be in an environment that encourages mental health treatment and structure" and that respondents "have failed to demonstrate that they will provide care that promotes [Brian's] healthy and orderly physical and emotional well-being[.]" the trial court concluded that it was in Brian's best interests to terminate respondents' parental rights and release Brian for adoption. After reviewing the record, we are not persuaded that the trial court abused its discretion in reaching its decision. Accordingly, we overrule respondent-father's final argument.

Conclusion

In light of the foregoing conclusions, we affirm the trial court order terminating respondents' parental rights to Brian.

Affirmed.

Chief Judge MARTIN and Judge HUDSON concur.

Judge TIMMONS-GOODSON submitted this opinion for filing prior to 31 October 2005.

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FREDDIE LEE DIXON, SR., AND MABEL DIXON, PLAINTIFFS v. THOMAS L. HILL, ADMINISTRATOR OF THE ESTATE OF JOHN BARBER, AND PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., A/K/A PALMETTO DELIVERANCE CHURCH, DEFENDANTS

No. COA04-86

(Filed 1 November 2005)

1. Appeal and Error— preservation of issues—substitution order—notice of appeal—failure to object

The appellate court had no jurisdiction to review defendants' contentions regarding an order substituting the administrator of a deceased party's estate as a party defendant because defendants did not specifically reference the order of substitution in the notice of appeal from a summary judgment order and the record contains no indication that defendants objected to the order of substitution.

2. Civil Procedure— substitution of administrator—notice of summary judgment motion

The trial court erred by granting summary judgment in favor of plaintiffs as to the administrator of a deceased defendant's estate who was substituted as a party for the deceased defendant because that he did not receive proper notice of the motion for summary judgment where (1) the order of substitution on 15 September 2003 making the administrator a party to this action was entered on the same day that the court entered the summary judgment order, and defendant administrator was denied the notice required by N.C.G.S. § 1A-1, Rule 56, and (2) a 14 February 2000 order directing the substitution of a nonexistent personal representative or collector did not comply with N.C.G.S. § 28A-18-1 or N.C.G.S. § 1A-1, Rule 25, and the substitution thus did not occur until 15 September 2003.

3. Appeal and Error— preservation of issues—failure to raise in trial court

Defendant church's argument that it was not properly served with a summary judgment motion was not preserved for appeal where the issue of proper notice was not raised in the trial court.

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4. Civil Procedure— summary judgment—substitution order on same day—additional name for church—notice

Defendant church was not deprived of proper notice of a summary judgment motion because the trial court granted a motion for substitution on the same day as the hearing on the summary judgment motion where, with respect to the church, the substitution order only added an additional name by which the church was known; the church was already a party to the action; and the church was not prejudiced by the entry of substitution and summary judgment orders on the same day.

5. Civil Procedure— summary judgment—supporting affidavit—personal knowledge

Plaintiff wife's affidavit was not based upon mere information and belief and was competent evidence to support the entry of summary judgment against defendant church in an action for breach of contract, fraud, negligent misrepresentation, conversation, unfair trade practices, unjust enrichment and punitive damages arising from the purchase of a home by the church's bishop using plaintiffs' settlement funds where the affidavit stated that the wife "has personal knowledge of the matters stated herein, except where stated upon information and belief," but the facts stated in the affidavit were all based upon the wife's personal knowledge.

6. Civil Procedure— summary judgment—unverified answer—unverified discovery responses

Plaintiffs' motion for summary judgment could not be defeated by defendant church's denials of plaintiffs' allegations in its unverified answer or by defendant's unverified responses to plaintiffs' request for admissions.

7. Discovery— request for admissions—failure to rebut proper service—failure to respond

Defendant church failed to demonstrate that it was not served with plaintiffs' request for an admission that the church's bishop was acting as its agent when performing the acts and omissions at issue where the trial court had allowed the church's attorney to withdraw, plaintiffs were required by N.C.G.S. § 1A-1, Rule 5(b) to serve the church directly, and the church offered no evidence that the address on the certificate of service was incorrect. Therefore, the church was deemed to have admitted that the

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bishop was acting as its agent where the church failed to timely respond to the request for admissions.

Appeal by defendants from order entered 15 September 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 6 December 2004.

R. Clark Speaks for plaintiff-appellee Freddie Lee Dixon, Sr.

Scott T. Slusser for plaintiff-appellee Mabel Dixon.

William L. Davis, III for defendants-appellants.

GEER, Judge.

On 1 April 1999, plaintiffs Freddie Lee Dixon, Sr. and Mabel Dixon filed suit against John Barber and defendant Palmetto Born Again Church of Christ (Apostolic), Inc. ("the Church"). On 15 September 2003, the Robeson County Superior Court entered two orders: (1) an order substituting as defendant Thomas L. Hill, administrator of the estate of John Barber, for the deceased defendant Barber and modifying the name of the Church to indicate that it was also known as Palmetto Deliverance Church; and (2) an order entering summary judgment in favor of plaintiffs. Defendants Hill and the Church contend on appeal that they did not receive proper notice of the motion to substitute and the motion for summary judgment, that the motion to substitute was improperly allowed, and that genuine issues of material fact exist precluding summary judgment.

We hold that defendants failed to properly appeal from the order of substitution and, accordingly, dismiss that portion of defendants' appeal. Because Hill was substituted as a party on the same day as the court entered summary judgment, we hold that Hill was not provided with notice of the motion for summary judgment as mandated by N.C.R. Civ. P. 56. We, therefore, reverse the grant of summary judgment as to Hill. With respect to the Church, however, we hold that it had proper notice of the motion for summary judgment and that none of the arguments advanced by the Church on appeal warrant reversal of the summary judgment order as to the Church.

Facts

On 20 June 1993, plaintiffs' son, Freddie Lee Dixon, Jr., died in an accident when a tractor-trailer collided with the van in which he was riding. Plaintiffs filed a wrongful death action against the

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company that owned the truck and eventually settled their claim for \$111,192.99.

John Barber was bishop of the defendant Church. During the settlement negotiations in the wrongful death action, Barber acted as a spokesperson for plaintiffs and, according to plaintiffs, told them not to talk to their attorneys. Defendants, in their answer,¹ admitted that on 14 June 1994, the same day that plaintiffs received the settlement, plaintiffs gave the \$111,192.99 settlement check to Barber. Barber in turn gave them a receipt reciting that the \$111,192.99 was “for down payment on stock and on house \$35,000.00.” Plaintiff Mabel Dixon stated in her affidavit that Barber promised plaintiffs that he “would purchase \$75,000.00 worth of orange juice stock which would yield a 10% return per year” and that “he would buy a house for [plaintiffs] with \$35,000.00 down payment and \$600.00/month for eight (8) years.” Defendants’ answer “admitted that the Defendant, Bishop John Barber, agreed to arrange for the Plaintiffs to purchase the house located at 3524 Pine Log Road, Lumberton, North Carolina for the sum of \$89,000.00 with a down payment of \$35,000.00,” while defendants’ responses to plaintiffs’ First Request for Admissions “admitted that John Barber told Plaintiffs that their \$75,000.00 would earn 10% interest per year.”

Ms. Dixon states in her affidavit that Barber told plaintiffs that he had bought the house, but put it in the name of the Church. According to defendants’ answer, the house was “to be held in the name of the church since the Plaintiffs were unable to qualify for financing” Ms. Dixon explained that plaintiffs moved into the house and began paying the \$600.00 per month directly to Barber. Barber never gave plaintiffs a real estate contract for the home and defendants have “admitted that legal title is not owned by Plaintiffs.”

Ms. Dixon’s affidavit states that after a year, plaintiffs asked Barber about the interest being earned on the orange juice stock. According to Ms. Dixon, Barber answered “that he waited too long to get the interest and that it rolled over into the principal amount for next year.” The following year, plaintiffs again asked about the annual return, and Barber gave them a similar response. Defendants have admitted that Barber did not invest the settlement funds in any “orange juice stock” and that none of plaintiffs’ money has ever been returned to them.

1. The Church and defendant Barber, before he passed away, filed a joint answer and a joint response to plaintiffs’ First Request for Admissions.

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With respect to the Pine Log Road residence, Ms. Dixon stated that after the plaintiffs had lived in the house for approximately two years, the home—which the Church stated in its answer was “to be held in the name of the Church”—was deeded to Benny and Geneva Abraham. According to Ms. Dixon’s affidavit, the Abrahams’ lender foreclosed on the house, and plaintiffs were evicted from their home.

On 1 April 1999, plaintiffs brought suit against Barber and the Church, asserting causes of action for (1) breach of contract, (2) fraud and/or constructive fraud, (3) negligent misrepresentation, (4) conversion, (5) unfair and deceptive trade practices, (6) restitution and/or unjust enrichment, and (7) punitive damages. Defendants filed a joint answer to the complaint on 4 June 1999, admitting some of plaintiffs’ allegations and denying others.

On 12 January 2000, Barber died. His will named Fred L. Musselwhite as the executor of his estate. Mr. Musselwhite formally renounced his duties as executor on 20 January 2000. Four days after Musselwhite’s renunciation, plaintiffs filed a motion “to substitute the Estate of John Barber and John Barber’s personal representative or collector for the Defendant John Barber. Said substitution is made necessary by the death of Defendant John Barber on or about January 12, 2000.” The trial court allowed plaintiffs’ motion on 14 February 2000. At this time, no person had yet been appointed to replace Musselwhite in the capacity of executor.

Almost two years later, on 7 February 2003, Bishop Thomas L. Hill was appointed as administrator of Barber’s estate. On 11 August 2003, plaintiffs filed a motion to substitute Hill, as administrator of the estate of John Barber, as a defendant. In addition, the motion indicated that plaintiffs had learned that the Church also conducted business under the name of Palmetto Deliverance Church. Plaintiffs’ motion, therefore, asked to change the identification of the Church from “Palmetto Born Again Church of Christ (Apostolic), Inc.” to “Palmetto Born Again Church of Christ (Apostolic), Inc., a/k/a Palmetto Deliverance Church.” On the same day, plaintiffs filed a motion for summary judgment, attaching an affidavit of plaintiff Mabel Dixon and plaintiffs’ Second Request for Admissions to which the Church had not responded.²

Following a hearing on 15 September 2003, the trial court entered an order on the same date allowing the motion to substitute, includ-

2. At the time the Second Request for Admissions was served, defendant Barber had passed away and Hill had not yet been appointed administrator of the estate.

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ing the substitution of Hill as administrator of Barber's estate. Also on 15 September 2003, the trial court entered summary judgment in favor of plaintiffs on all seven causes of action asserted in the complaint. The court determined that plaintiffs' damages equaled \$127,992.00: the original sum of \$111,192.99 given by plaintiffs to Barber plus 28 monthly house payments of \$600.00 each (a total of \$16,800.00). After concluding that defendants' acts constituted unfair and deceptive trade practices, the court trebled the damages and entered judgment in the amount of \$383,976.00. Defendants have appealed.

The Order of Substitution

[1] Defendants contend that they were not properly served with the motion for substitution. We first note that the notice of appeal states only: "The Defendants hereby gives [sic] Notice of Appeal to the North Carolina Court of Appeals from a final judgment entered on September 15, 2003 by the Honorable Gary Locklear granting Summary Judgment in favor of Plaintiff[s]." The notice of appeal thus does not specifically appeal the order allowing substitution.

Proper notice of appeal requires that the appealing party "designate the judgment or order from which appeal is taken and the court to which appeal is taken" N.C.R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). N.C. Gen. Stat. § 1-278 (2003), however, provides a means by which an appellate court may obtain jurisdiction to review an order not included in a notice on appeal. It states: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." *Id.*

This Court has held that appellate review pursuant to N.C. Gen. Stat. § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 370, 547 S.E.2d 1-2 (2001). All three conditions must be met. *Id.* at 642, 535 S.E.2d at 59.

In this case, defendants have failed to meet the first requirement. Nothing in the record establishes that either defendant timely objected to the order of substitution. Rule 46(b) of the Rules of Civil

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Procedure provides, as to interlocutory orders not directed to the admissibility of evidence, that “formal objections and exceptions are unnecessary.” Instead,

[i]n order to preserve an exception to any such ruling or order or to the court’s failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party’s objection to the action of the court or makes known the action that the party desires the court to take and the party’s grounds for its position.

Id. The opposition must specify “what action [the non-movant] wanted the trial court to take and the grounds for that action.” *Inman v. Inman*, 136 N.C. App. 707, 712, 525 S.E.2d 820, 823, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000).

In this case, the record contains no written opposition to the motion to substitute. In addition, as defendants did not file with this Court a transcript of the 15 September 2003 hearing, there is no indication that defendants made any oral objections to the motion to substitute. Accordingly, because defendants did not specifically reference the order of substitution in the notice of appeal and because the record contains no indication that defendants objected to the entry of that order, we do not have jurisdiction to review defendants’ contentions regarding the order of substitution.

Appeal of the Summary Judgment Order by Hill

[2] We agree, however, with defendant Hill that he did not receive proper notice of the motion for summary judgment. The order of substitution making Hill a party to this action in his capacity as administrator of Barber’s estate was entered on 15 September 2003, the same day that the court entered summary judgment against defendant Hill. In other words, Barber’s estate became liable to plaintiffs on the very same day that it became a party to the lawsuit.

N.C.R. Civ. P. 56(a), governing summary judgment proceedings, provides: “A party seeking to recover upon a claim . . . may, at any time *after the expiration of 30 days from the commencement of the action* . . . move with or without supporting affidavits for a summary judgment in his favor . . .” (Emphasis added.) Rule 56(c) further provides that any motion for summary judgment must be served on the opposing party at least 10 days before any scheduled hearing on the matter. This Court has held that notice of a hearing on a summary judgment motion must also be given at least 10 days prior to the hear-

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ing. *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999). Here, the action did not commence against the Barber estate until 15 September 2003, the day Hill was joined as a party. Defendant Hill was, therefore, denied the notice required by Rule 56.

Plaintiffs argue, however, that the estate was actually made a party when the trial court on 14 February 2000 ordered “that the Estate of John Barber and John Barber’s personal representative or collector be substituted for Defendant John Barber.” We disagree. It is undisputed that as of that date, no personal representative or collector existed. Thus, the order did not effectively substitute anyone.

As this Court explained with respect to a lawsuit mistakenly brought against a deceased person named John Daniel Johnson rather than against his estate:

John Daniel Johnson, a legal entity, is transformed, after death, into the estate of John Daniel Johnson, a legal entity. . . . [T]he life and estate of John Daniel Johnson are inextricably dependent: Death of the person is a point at which a legal transformation to an estate can occur. Once death occurs, the legal entity known as the life of John Daniel Johnson can never again have legal standing.

Pierce v. Johnson, 154 N.C. App. 34, 40, 571 S.E.2d 661, 665 (2002). In recognition of this principle, N.C. Gen. Stat. § 28A-18-1(a) provides that upon the death of any person, all right to defend any action existing against the deceased “shall survive . . . against the personal representative or collector of his estate.”

As a result, when Barber died, this action did not abate, but it could not be continued against Barber or his estate generally. The action survived only against the personal representative or collector of Barber’s estate. *Shaw v. Mintz*, 151 N.C. App. 82, 86, 564 S.E.2d 593, 596 (Greene, J., dissenting) (“An injured party’s right to proceed with a claim against a person she claims to have negligently caused her injuries is not abated by the death of the party alleged to have been negligent, as the action survives against the personal representative or collector of the decedent’s estate.”), *adopted per curiam*, 356 N.C. 603, 572 S.E.2d 782 (2002). The personal representative must then be substituted under N.C.R. Civ. P. 25(a). *In re Estate of Etheridge*, 33 N.C. App. 585, 587, 235 S.E.2d 924, 926 (1977) (“If, as in the case at bar, there is a death of a party to an action, then G.S. 1A-1, Rule 25(a) . . . requires the substitution of either a personal representative or a successor in interest.”).

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The 14 February 2000 order directing the substitution of the non-existent “personal representative or collector” does not comply with N.C. Gen. Stat. § 28A-18-1 or Rule 25. As our Supreme Court has stated, “our statutory scheme for handling claims against decedents’ estates presumes the appointment of a personal representative or collector to receive those claims.” *Ragan v. Hill*, 337 N.C. 667, 673, 447 S.E.2d 371, 375 (1994). In both *Ragan* and *Shaw*, our courts acknowledged that a plaintiff is unable to proceed with litigation against an estate until an administrator is actually appointed. *Ragan*, 337 N.C. at 673, 447 S.E.2d at 375 (“Once Hill was appointed administrator, plaintiffs were able to proceed with this action against Hill in his role as administrator pursuant to N.C.G.S. § 28A-18-1.”); *Shaw*, 151 N.C. App. at 87, 564 S.E.2d at 596 (when the plaintiff filed a timely action against the defendant, who then died, but did not proceed against the estate prior to the running of the statute of limitations, the claim was not necessarily barred because the record did not indicate that any administrator had been appointed).

Thus, the 14 February 2000 order could not operate to substitute Barber’s personal representative. That substitution did not occur until 15 September 2003. Because the estate’s administrator did not become a party until 15 September 2003, he did not receive proper notice of the summary judgment motion and that order must be reversed as to defendant Hill and remanded for further proceedings.

Appeal of the Summary Judgment Order by the Church

[3] The Church first argues that it was not properly served with the motion for summary judgment. Plaintiffs respond that “[t]he issue of proper notice was never raised at the trial court level and no objection to the manner of service was ever raised until this appeal.”

N.C.R. App. P. 10(b)(1) states: “In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” The record contains nothing indicating that the Church objected below on the grounds of improper service. As the appellant, it was the Church’s responsibility to ensure that the record contains those materials necessary to determine its appeal. *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972) (“It is the duty of an appellant to see that the record is properly made up and transmitted.”) Because the Church has failed to

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demonstrate that it preserved this objection below, we overrule this assignment of error.³

[4] The Church argues alternatively that it, like the administrator of Barber's estate, was deprived of proper notice of the summary judgment motion because the trial court granted the motion for substitution on the same day as the hearing on the summary judgment motion. The Church, however, was already a party to this action. With respect to the Church, the substitution order only added an additional name by which the Church was known. Neither the record on appeal nor the Church's appellate brief suggests that the addition of "a/k/a Palmetto Deliverance Church" altered the identity of the defendant. Since the Church was already a party and the Church has not suggested any manner in which it was prejudiced by the entry of the two orders on the same day, the trial court did not err with respect to the Church in considering the motion for summary judgment on the same day that it heard the motion to substitute.

The Church next contends that issues of fact precluded entry of summary judgment on plaintiffs' claims. The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the non-moving party will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-

3. Plaintiffs have included in the appendix to their brief documentation to support their contention that the Church was properly served. In making its argument, the Church similarly relies upon a document that post-dates the trial court's summary judgment order. Since this material was not presented to the trial court in the first instance, it may not be considered by this Court. That material has not, therefore, been considered in connection with this appeal.

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moving party “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” N.C.R. Civ. P. 56(e).

The trial court concluded that the Church was jointly and severally liable to plaintiffs for unfair and deceptive trade practices, fraud/constructive fraud, breach of contract, conversion, negligent misrepresentation, restitution/unjust enrichment, and punitive damages. The court then found that plaintiffs were entitled to compensatory damages in the amount of \$127,992.00, which it trebled based on its conclusion that defendant had committed an unfair and deceptive trade practice.

[5] The Church first contends that plaintiffs failed to present sufficient evidence to support summary judgment in their favor, arguing that Ms. Dixon’s affidavit is not competent evidence because it was based upon information and belief. See *Currituck Assocs. Residential P’ship v. Hollowell*, 170 N.C. App. 399, 403-04, 612 S.E.2d 386, 389 (2005). That affidavit actually stated that Ms. Dixon “has personal knowledge of the matters stated herein, except where stated upon information and belief.” When, however, the facts were actually set out in the affidavit, none of them were qualified as being “upon information and belief.” Accordingly, there is no indication in the record that Ms. Dixon lacked personal knowledge with respect to the facts set forth in her affidavit.

[6] Second, although the Church acknowledges that it did not submit any evidence in opposition to the Dixon affidavit, it contends that issues of fact still exist based on the Church’s and Barber’s denial of the allegations in plaintiffs’ complaint and based on the denials contained in their response to plaintiffs’ First Request for Admissions. The Church’s answer was not verified and, therefore, the denials contained in that answer are not sufficient to defeat summary judgment. *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 288-89, 616 S.E.2d 349, 354 (2005) (holding that the trial court properly granted the plaintiff summary judgment when the defendant relied solely on the denial in its unverified answer).

Likewise, the Church’s denials in response to plaintiffs’ First Request for Admissions do not give rise to issues of fact for purposes of a motion for summary judgment. Those responses were not verified and, therefore, cannot be deemed to be an affidavit. Nor do they fall within the category of “depositions, answers to interrogatories,

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and admissions on file” specified in Rule 56 as material that may be considered. The Church was obligated to present a forecast of evidence—not mere allegations—demonstrating the existence of genuine issues of material fact. *See Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 149 (3d Cir.) (“Although [plaintiff] denied knowledge or information about the helicopter in its responses to requests for admission, its general denial is insufficient to create a genuine issue of fact.”), *cert. denied*, 528 U.S. 878, 145 L. Ed. 2d 158, 120 S. Ct. 188 (1999); *Am. Communications Telecomms., Inc. v. Commerce North Bank*, 691 S.W.2d 44, 48 (Tex. App. 1985) (“When an answering party denies or refuses to make an admission of fact [in response to a request for admissions], such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal.”).

[7] Finally, the Church argues that summary judgment is improper as to the Church because plaintiffs have failed to present evidence that Barber was acting as an agent of the Church. Plaintiffs’ Second Request for Admissions asked the Church to admit that Barber was acting as an agent for the Church when performing the acts and omissions alleged in the complaint. Rule 36(a) of the Rules of Civil Procedure provides that each request “is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection” It is undisputed that the Church neither responded nor objected to the Second Request for Admissions. Moreover, the record contains no indication that the Church ever moved to withdraw the admissions resulting from its failure to respond. *See* N.C.R. Civ. P. 36(b) (“Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”).

The Church argues, however, that the Second Request for Admissions was not properly served on the Church. The certificate of service dated 22 May 2001 indicated service by mailing to “Bishop Thomas L. Hill” and the “Palmetto Born Again Church of Christ (Apostolic)” at a post office box in Lumberton, North Carolina. The record also includes a return receipt attached to the certificate of service evidencing receipt by Thomas L. Hill on 29 May 2001. The Church does not argue that the address was the wrong address for the Church or that the Church failed to receive the Second Request for Admissions. Instead, the Church contends that proof of service

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was insufficient because plaintiffs failed to offer proof that Mr. Hill was an officer, director, or agent of the Church as set out in Rule 4(j)(6) and (8) of the Rules of Civil Procedure.

Plaintiffs were obligated to serve the Second Request for Admissions in accordance with Rule 5 of the Rules of Civil Procedure. Rule 5(b) provides:

With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record. *With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court.*

(Emphasis added.) As the plain language of Rule 5(b) indicates—contrary to the Church's contention—a party is not required to comply with Rule 4 in serving documents subsequent to the complaint. Instead, Rule 5(b) specifically permits parties to serve another party by mail or delivery to that party's attorney or, if unrepresented, to that party.

Because the trial court had allowed the Church's attorney to withdraw, plaintiffs were required to serve the Church directly.⁴ See 1 James W. Moore et al., *Moore's Federal Practice* § 5.04[1][b] (3d ed. 1997) ("[I]f a party is no longer represented by an attorney in a particular action, service must be made directly on the party."). Rule 5(b) authorized plaintiffs to serve the Church by mailing the Second Request for Admissions to the Church at the Church's last known address. Once plaintiffs submitted a certificate of service and return receipt indicating service upon the Church, the burden lay with the Church to establish that service was inadequate because the address was not the Church's last known address. *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 450-51 (1999) (holding that because the plaintiff made no attempt to rebut the presumption of receipt arising

4. The trial court allowed defendants' counsel to withdraw on 23 April 2001, finding that "[d]efendants' counsel has given reasonable notice of his intention to withdraw to Defendants." Plaintiffs mailed their Second Request for Admissions a month later on 22 May 2001.

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from a certificate of service and signed return receipt, the plaintiff was presumed to have been properly served with a request for admissions). The Church offered no evidence and has made no argument that the address on the certificate of service was incorrect.

We note further that once the Church's attorney was allowed to withdraw, the Church had an obligation to keep the Court and plaintiffs advised of a current address for the service of papers. *See Freed v. Plastic Packaging Materials, Inc.*, 66 F.R.D. 550, 552 (E.D. Pa. 1975) ("All parties have an obligation to keep the Court advised of a current address for the service of papers, either to counsel or the party directly."). A party who does not comply with this obligation "should not thereby be able to foreclose an opposing party from taking full advantage of the procedures which our Rules [of Civil Procedure] allow." *Id.* (granting summary judgment to a plaintiff based on the defendant's failure to respond to a request for admissions after its attorney had withdrawn). *Compare Barnett*, 134 N.C. App. at 351, 517 S.E.2d at 400 (holding that the *pro se* defendant was not properly served with a request for admissions when he had provided the plaintiff with a mailing address for subsequent service of pleadings, but the plaintiff had not used that address).

Because the Church failed to demonstrate that it was not served with the Second Request for Admissions, the Church is deemed to have admitted each of those requests. *Excel Staffing*, 172 N.C. at 285, 616 S.E.2d at 352 ("In order to avoid having the requests deemed admitted, a party must respond within the specified time period."). By not responding, the Church admitted that Barber was acting as its agent. The Church does not present any further argument in its brief regarding whether the undisputed facts set out by the trial court are sufficient to establish liability under plaintiffs' causes of action. We, therefore, affirm the trial court's order granting summary judgment to plaintiffs with respect to their claims against the Church.

Conclusion

We dismiss defendants' appeal to the extent they seek reversal of the trial court's order of substitution. We reverse the trial court's entry of summary judgment as to Hill, who was substituted as administrator for the estate of Barber, on the grounds that he did not receive proper notice of the motion for summary judgment. The trial court's order granting summary judgment to plaintiffs and against the Church is, however, affirmed.

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Dismissed in part, affirmed in part, reversed and remanded in part.

Chief Judge MARTIN and Judge CALABRIA concur.

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No. COA04-1008

(Filed 1 November 2005)

1. Hospitals and Other Medical Facilities— certificate of need—appeal of denial—exhaustion of administrative remedies

Plaintiffs' failure to exhaust administrative remedies meant that the trial court lacked subject matter jurisdiction over claims arising from the denial of a certificate of need to replace and expand a hospital. The court properly dismissed plaintiffs' constitutional claims and request for a declaratory judgment.

2. Hospitals and Other Medical Facilities— denial of certificate of need—dismissal of injunctive claim—failure to exhaust administrative remedies

Failure to exhaust adequate administrative remedies properly resulted in the dismissal of a claim for injunctive relief arising from the denial of a certificate of need to replace and expand a hospital.

3. Civil Rights— § 1983—exhaustion of administrative remedies

Procedural due process claims may not be brought under 42 U.S.C. § 1983 until administrative remedies have been exhausted. Although violation of a *substantive* right may be the subject of a § 1983 claim regardless of the exhaustion of remedies, plaintiffs here did not sufficiently state such a claim.

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4. Constitutional Law— petitioning for redress—lobbying—immunity

The Noerr doctrine applies in North Carolina to bar any claim that has its gravamen in constitutionally protected petitioning activity. The trial court here did not err by dismissing claims by one hospital against another arising from the denial of a certificate of need; the exceptions for false information depriving the proceeding of legitimacy and sham or objectively baseless lobbying activities did not apply.

Appeal by plaintiffs and plaintiff-intervenor from judgment entered 6 April 2004 by Judge Robert F. Floyd, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 23 March 2005.

Smith Moore LLP, by Maureen Demarest Murray, Susan M. Fradenburg, and William W. Stewart, Jr., for plaintiffs-appellants.

Morgan, Reeves and Gilchrist, by C. Winston Gilchrist, for plaintiff-intervenor-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe and Special Deputy Attorney General R. Marcus Lodge, for State defendants-appellees.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Kathleen A. Naggs, and Nelson Mullins Riley & Scarborough, L.L.P., by Noah H. Huffstetler, III, Denise M. Gunter and Lisa R. Gordon, for defendant-appellee Betsy Johnson Regional Hospital, Inc.

Bode, Call & Stroupe, L.L.P., by S. Todd Hemphill and Robert V. Bode, for defendant-appellee Amisub of North Carolina, Inc., d/b/a/ Central Carolina Hospital.

STEELMAN, Judge.

Plaintiffs appeal the dismissal of their claims by the trial court. Because the trial court dismissed the claims under Rule 12(b) of the Rules of Civil Procedure, our recitation of the relevant factual background is based upon the allegations contained in plaintiffs' complaint.

Plaintiff Good Hope Hospital (Good Hope) is currently located in Erwin, Harnett County. Its facility was originally constructed in 1921,

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and is licensed for a total of 72 beds, consisting of 43 acute care beds and 29 psychiatric beds. The current facility contains two operating rooms. On 15 April 2001, Good Hope filed an application for a certificate of need (CON) with the North Carolina Department of Health and Human Services (Department) proposing to develop a partial replacement facility, located about three miles from the existing facility. The application proposed to develop 34 acute care beds, 12 psychiatric beds, and 3 operating rooms at the new facility, and to continue the use of the existing facility for outpatient therapy, medical records, plant operations and maintenance, training, and storage. A CON was issued to Good Hope by Department on 14 December 2001 for this proposed project.

Good Hope proposed to finance the new facility through a loan approved by the United States Department of Housing and Urban Development (HUD). This proposal was submitted to the Medical Care Commission for approval. Betsy Johnson Regional Hospital, Inc. (Betsy Johnson) operates a hospital located in Dunn, Harnett County. There were unsuccessful merger talks between Good Hope and Betsy Johnson. Betsy Johnson commented against Good Hope's financing proposal before the Medical Care Commission. The Medical Care Commission denied approval of Good Hope's financing proposal and directed it to seek private financing. It subsequently approved a \$26,000,000.00, 68 bed expansion of Betsy Johnson, with HUD financing.

Good Hope subsequently entered into an agreement with Triad Hospitals, Inc. to form a joint venture, Good Hope Health System, LLC. (these three entities are hereinafter referred to collectively as "plaintiffs"). The purpose of the joint venture was to erect and operate a hospital in Harnett County. Triad was not willing to proceed with construction of the new facility based upon the 14 December 2001 CON, but wanted to construct a larger facility at a different location. On 13 April 2003 plaintiffs filed a new CON application with Department to develop a larger replacement hospital to be located in Lillington. The application proposed 34 acute care beds, 12 psychiatric beds and 3 operating rooms. Department denied this application on 26 September 2003. Plaintiffs appealed this denial to the Office of Administrative Hearings, to the Superior Court of Wake County, and to this Court. Betsy Johnson and Amisub were allowed to intervene in this appeal, opposing the issuance of the CON.

On 22 August 2003, plaintiffs notified Department of their intent to develop a replacement hospital facility under the provisions of

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N.C. Gen. Stat. § 131E-184(a). This statute exempts projects from CON review under certain specific circumstances. The stated basis of this notice was that the condition of Good Hope had deteriorated and that there existed imminent safety hazards as defined by federal and state codes. By letters dated 11 December 2003 and 15 January 2004, Department advised plaintiffs that their proposed project was not exempt from CON review under the provisions of N.C. Gen. Stat. § 131E-184(a). This decision was based upon the correction of "the deficiencies that constituted 'an immediate and serious threat' to the health and safety of patients." We take judicial notice that plaintiffs appealed this decision to the Office of Administrative Hearings, to the Superior Court of Wake County, and to this Court.

On 29 January 2004, plaintiffs filed this action in the Superior Court of Harnett County. Their complaint alleged the following claims: (1) for declaratory judgment that plaintiffs are entitled to construct a new hospital in Harnett County under the exemption provisions of N.C. Gen. Stat. § 131E-184, without any restrictions as to "size or capital expenditure."; (2) for a mandatory injunction compelling Department to exempt a 72 bed, 3 operating room facility from the CON requirements; (3) that the denial of plaintiffs' exemption requests violated their rights of equal protection, due process and § 42 U.S.C. 1983; (4) that Betsy Johnson's opposition to plaintiffs' proposed projects constituted tortious interference with contract, tortious interference with prospective economic advantage, a conspiracy in restraint of trade in violation of N.C. Gen. Stat. § 75-1, and unfair and deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1, and common law unfair competition, (5) an injunction prohibiting Betsy Johnson from further interfering with or opposing plaintiffs' proposed projects. Plaintiffs joined Amisub as a defendant, alleging that under N.C. Gen. Stat. § 1-260 it may have an interest that may be affected by the litigation, but made no further allegations as to Amisub. Defendant, Betsy Johnson, filed a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) on 10 February 2004. Defendant Department filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), to dismiss for failure to state a claim under Rule 12(b)(6) and to strike plaintiffs' request for a jury trial under Rule 12(f) on 13 February 2004. Plaintiffs filed a motion for partial summary judgment as to certain of their claims for declaratory relief on 17 February 2004. Defendant, Betsy Johnson filed a supplemental motion to dismiss on 26 February 2004, asserting as an additional basis of its motion to dismiss lack of subject matter jurisdiction under Rule 12(b)(1). On 20

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February 2004, the Town of Lillington (Intervenor) moved to intervene as a party plaintiff in the case. This motion was granted on 1 March 2004.

On 1 March 2004, these motions came on for hearing before Judge Floyd. On 1 April 2004, Judge Floyd entered two orders encompassing the following rulings: (1) Betsy Johnson's motion to dismiss was granted; (2) plaintiffs' claims for declaratory judgment and injunctive relief against Betsy Johnson were denied; (3) Department's motion to dismiss was granted, except as to the claim under the Public Records Act; (4) Department's motion to strike plaintiffs' request for a jury trial was denied; (5) plaintiffs' motions for preliminary and permanent injunctions were denied. On 3 May 2004, plaintiffs dismissed their claims under the Public Records Act, with prejudice. Plaintiffs and Intervenor appeal the two orders entered on 1 April 2004.

[1] In their first argument, plaintiffs contend that the trial court erred in dismissing the claims against Department. We disagree.

The trial court dismissed plaintiffs' claims against Department pursuant to Rule 12(b)(1) based upon a lack of subject matter jurisdiction. "An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999). Before any hospital may service the public, it must first obtain a licence from the Department of Health and Human Services. N.C. Gen. Stat. § 131E-77. Pursuant to N.C. Gen. Stat. § 131E-78(a), the Department of Health and Human Services has the sole "authority to deny, suspend, revoke, annul, withdraw, recall, cancel, or amend a license in any case when it finds a substantial failure to comply with the provisions of this Part or any rule promulgated under this Part." Any applicant who has been denied a license has a right to a hearing pursuant to Chapter 150B to review that decision. N.C. Gen. Stat. § 131E-78(b)(1). "Any applicant or operator who is dissatisfied with the decision of the Department as a result of the hearing provided in this section and after a written copy of the decision is served, may request a judicial review under Chapter 150B of the General Statutes, the Administrative Procedure Act." N.C. Gen. Stat. § 131E-78(c).

In the instant case, plaintiffs requested a hearing pursuant to N.C. Gen. Stat. § 131E-78(b)(1), but also filed the instant claim seeking relief in the courts of general jurisdiction before exhausting their administrative remedies. "[T]he proper course for the plaintiffs was

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to exhaust their remedies under the [Administrative Procedure Act] before seeking judicial review.” *North Buncombe Ass’n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990). Plaintiffs claim that they were not required to exhaust this administrative remedy because the administrative remedies are inadequate, and the administrative agencies do not have jurisdiction to hear their constitutional and § 1983 claims, nor grant declaratory or injunctive relief.

“When the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts. On the other hand, if the remedy established by the NCAPA is inadequate, exhaustion is not required. The burden of showing inadequacy is on the party claiming inadequacy, who must include such allegations in the complaint.” *Jackson v. North Carolina Dep’t of Human Resources Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903-04 (1998).

In *Rhodes*, *supra*, plaintiffs filed a claim in Buncombe County Superior Court seeking to have a mining permit issued to Vulcan Materials Company, Inc. to operate a crushed stone quarry declared void, and further seeking injunctive relief. Plaintiffs’ complaint sought, *inter alia*, a declaratory judgment requesting the trial court to determine that the Mining Act (N.C. Gen. Stat. §§ 74-46 to -68) was unconstitutional as applied to them, and that the permit had been improperly granted.

The *Rhodes* Court held that the trial court lacked jurisdiction to consider plaintiffs’ claims under the Declaratory Judgment Act, including their constitutional claim, because they had failed to exhaust their administrative remedies under the Administrative Procedure Act. *Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462. For the same reason, we hold that the trial court properly dismissed plaintiffs’ constitutional claims, and its request for declaratory judgment. *See also*, *Murphy v. McIntyre*, 69 N.C. App. 323, 328, 317 S.E.2d 397, 400 (1984).

[2] Plaintiffs further argue that the trial court erred in dismissing their claim for injunctive relief, because the Department of Health and Human Services has no authority to grant equitable relief. “A pleading that alleges inadequacy of administrative remedy states a claim upon which equitable relief may be granted if the circumstances warrant it.” *Lloyd v. Babb*, 296 N.C. 416, 426-27, 251 S.E.2d

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843, 851 (1979). "The complaint must be carefully scrutinized 'to ensure that the claim for relief [is] not inserted for the sole purpose of avoiding the exhaustion rule.'" Thus, we must consider whether the available administrative remedies were indeed inadequate to resolve [plaintiff's] claims." *Jackson*, 131 N.C. App. at 187, 505 S.E.2d 899, 904 (citations omitted). We have thoroughly reviewed plaintiffs' claim seeking injunctive relief, and hold that the available administrative remedies are not inadequate to resolve their claim, and hold that it was properly dismissed.

[3] State courts have concurrent jurisdiction with federal courts over 42 U.S.C. § 1983 claims, and may hear certain constitutional claims even if administrative remedies have not been exhausted. *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996). Where a plaintiff argues that administrative remedies are inadequate, and thus violate procedural due process:

The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinerman v. Burch, 494 U.S. 113, 126, 108 L. Ed. 2d 100, 114 (1990); see also *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996). Thus, procedural due process claims may not be brought under § 1983 until administrative remedies have been exhausted. *Id.*

Violation of a substantive constitutional right may be the subject of a § 1983 claim, regardless of whether administrative remedies have been exhausted, because the violation is complete when the prohibited action is taken. *Id.* However:

The text of section 1983 permits actions only against a "person." In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989), the Supreme Court held that when an action is brought under section 1983 in state court against the State, its agencies, and/or its officials acting in their official capacities, neither a State nor its officials acting in their official capacity are

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“persons” under section 1983 when the remedy sought is monetary damages.

Corum v. University of North Carolina, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (1992). In support of their § 1983 claim, plaintiffs allege:

Agency defendants through their actions have caused plaintiffs to lose the \$200,000 grant from the Kate B. Reynolds Foundation for the replacement facility, deprived plaintiffs of the right to do business, due process of law, equal protection and have imposed excessive fines against Good Hope Hospital through the forced expense in excess of \$225,000 to make unwarranted repairs in, rather than replacement of, an inadequate, deficient and aged hospital facility, thereby depriving Good Hope Hospital of the use of such funds to develop a replacement hospital facility and have caused Good Hope to incur significant expenses including attorneys fees in violation of 42 U.S.C. § 1983.

To the extent that plaintiffs are seeking monetary damages, the state defendants are not “persons” in the § 1983 context. To the extent, if at all, that plaintiffs are seeking injunctive relief for violations of their procedural due process rights, their claim was properly dismissed for lack of jurisdiction for failure to exhaust their administrative remedies. Plaintiffs’ sole claim for relief pursuant to § 1983, then, would be for any claim for injunctive relief arguing that their equal protection rights have been violated. We are not convinced plaintiffs have stated any such claim for injunctive relief. Assuming *arguendo* such a claim exists, we hold that it was properly dismissed.

In support of their equal protection claim, plaintiffs state:

Agency defendants have deprived Good Hope Hospital of the right to equal protection under Article I, Section 19 of the North Carolina and the Fourteenth Amendment to the United States Constitution by their unauthorized and improper application of the CON Act [and other statutes and regulations] and by unfairly and improperly favoring Betsy Johnson in its expansion and partial hospital replacement projects and unfairly discriminating against Good Hope and its proposed replacement hospital facility.

Plaintiffs further make a general allegation of discrimination against them by the state defendants based on their “for profit status and the bias of the individual Agency defendants against for profit health care providers.” We note that the North Carolina Constitution is inapposite in a § 1983 claim.

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Though it appears the trial court dismissed this claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), defendants also moved for dismissal pursuant to Rule 12(b)(6), and we elect to review this argument based on Rule 12(b)(6). *Snuggs*, 310 N.C. at 740, 314 S.E.2d at 529.

The question before a court considering a motion to dismiss for failure to state a claim is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory. A complaint may be dismissed pursuant to Rule 12(b)(6) where "(1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim." "In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial."

Toomer v. Garrett, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002). "We are not required, however, 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir., 2002).

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The equal protection requirement "does not take from the States all power of classification," but "keeps governmental decision-makers from treating differently persons who are in all relevant respects alike." To succeed on an equal protection claim, [plaintiff] "must first demonstrate that [it] has been treated differently from others with whom [it] is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." If [it] makes this showing, "the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." To state an equal protection claim, [plaintiff] must plead sufficient facts to satisfy each requirement. . . .

Veney v. Wyche, 293 F.3d 726, 730-31 (4th Cir. 2002). Plaintiffs do not contend that they are entitled to any heightened scrutiny in the

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instant case, and after thoroughly reviewing their complaint we find no reason for any. Their claim is therefore subject to rational basis review, and their complaint must therefore allege that Department's discriminatory acts against them were without any rational basis. *Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 1063 (2000); *Willis v. Town of Marshall*, 2003 U.S. Dist. LEXIS 16967, 40-43 (W.D.N.C. 2003). Plaintiffs' complaint fails to allege lack of rational basis, therefore fails to state a claim upon which relief may be granted, and was properly dismissed. *See Id.* This argument is without merit.

[4] In their second argument, plaintiffs contend the trial court erred in dismissing the claims against Betsy Johnson. We disagree.

“ ‘A complaint should be dismissed for failure to state a claim where it is apparent that plaintiff . . . is entitled to no relief under any statement of facts which could be proven, more specifically, when there is an absence of law to support the claim asserted, a want of facts sufficient to establish a good claim, or some defense which will necessarily defeat the claim.’ ” *Brawley v. Brawley*, 87 N.C. App. 545, 552, 361 S.E.2d 759, 763 (1987). At the hearing on its motion to dismiss, Betsy Johnson argued that the *Noerr-Pennington* doctrine (*Noerr*) shielded it from any liability for plaintiffs' claims against it.

In *Noerr* and *Pennington*, the Supreme Court held that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability. This doctrine rests on two grounds: the First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.

Potters Medical Center v. City Hospital Asso., 800 F.2d 568, 578 (6th Cir., 1986). A search of the decisions of the appellate courts of this state turns up no instances where *Noerr* has been applied (*Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001), discusses *Noerr*, but declines to apply it, determining that *Noerr* is not implicated under the facts of that case). However the Fourth Circuit has applied *Noerr* in cases out of North Carolina. *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 791 F.2d 288, 292 (4th Cir., 1986); *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50 (4th Cir., 1981). We hold that *Noerr* applies in the state courts of North Carolina. *See also Gen-Probe, Inc. v. Amoco Corp.*,

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926 F. Supp. 948, 956 (D. Cal., 1996) (“*Noerr* immunity bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally-protected petitioning activity.”); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir., 1998) (“Thus, the *Noerr-Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.”).

Noerr has been recognized in federal courts in the context of certificate of need cases. *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 158 (3d Cir., 1999); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir., 1998); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558 (10th Cir. 1991); *Potters Medical Center v. City Hospital Asso.*, 800 F.2d 568, 578 (6th Cir., 1986); *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 791 F.2d 288, 292 (4th Cir., 1986); *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 955 (11th Cir. 1986).

Plaintiffs argue that they alleged facts in their complaint sufficient to establish two exceptions to *Noerr*, and thus survive Betsy Johnson's motion to dismiss. Plaintiffs argue that there exist both a “false information” and a “sham” exception to *Noerr* immunity protection. In *Kottle*, 146 F.3d 1056, the 9th Circuit applied *Noerr* in a certificate of need case and affirmed the district court's dismissal for failure to state a claim of plaintiff's suit based on *Noerr* immunity, even though plaintiff had alleged the “sham” exception, and further alleged that defendant had made numerous misrepresentations concerning plaintiff's CON petition. The 9th Circuit, after reviewing the relevant law, held that in the certificate of need context, a plaintiff

can get around the *Noerr-Pennington* doctrine only if his allegations show one of three things: (1) [defendant's] advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) [defendant] engaged in a pattern of petitions before the Department without regard to the merit of the petitions; or (3) [defendant's] misrepresentations before the Department deprived the entire CON proceeding of its legitimacy.

Kottle, 146 F.3d 1056, 1062-63. We find the 9th Circuit's reasoning compelling.

In the instant case plaintiffs have not alleged a “pattern of petitions before the Department without regard to the merit of the

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petitions,” so they fail the second prong of the test. In order for plaintiffs to succeed under the first prong of the test, they must allege “that a defendant’s lobbying activities were ‘objectively baseless’ for the ‘sham’ exception to apply. Lobbying activity is objectively baseless if a reasonable private citizen could not expect to secure favorable government action. The lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 862 (5th Cir., 2000). “A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.” *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (U.S., 1993). In the instant case, plaintiffs’ application for a CON for a replacement facility was rejected by the Agency. Plaintiffs appealed to the Office of Administrative Hearings, and lost that appeal. Because defendant Betsy Johnson was successful in its petition to prevent the issuance of a CON for plaintiffs’ proposed replacement facility, that petition can not be held to be objectively baseless. *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir., 1998).

In order for plaintiffs to prevail under the third prong of the test, they must allege facts indicating that defendant Betsy Johnson made misrepresentations before Department that deprived the entire CON proceeding of its legitimacy. “[W]hen ‘a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.’” *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir., 1998) (citation omitted). “In such cases, we employ a heightened pleading standard, and that standard ‘would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as “misrepresentations” by the other party.’” *Id.* (citations omitted).

In the instant case plaintiffs make vague allegations of misrepresentations on the part of defendant Betsy Johnson. A representative example of the allegations in plaintiffs’ complaint follows: “[Defendant] had made comparable misrepresentations to the Attorney General, including but not limited to Triad Hospitals’ past provision of charity care at a hospital in New Mexico, and Good Hope Health System’s commitment to provide charity care at the Good Hope Hospital replacement facility and has otherwise sought to malign the intentions of Good Hope Health System, Good Hope Hospital and Triad Hospitals.” Nowhere in its complaint do plaintiffs

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make allegations of any specific misrepresentations defendant Betsy Johnson made that could deprive the entire CON proceeding of legitimacy. We hold that plaintiffs' complaint fails to meet the heightened standard required to overcome defendant Betsy Johnson's *Noerr* immunity. Because defendant Betsy Johnson was protected by *Noerr* immunity, the trial court properly dismissed the claims against defendant Betsy Johnson. This argument is without merit.

AFFIRMED.

Judge McGEE concurs.

Judge TIMMONS-GOODSON concurs prior to 31 October 2005.

LUTHER T. BOYKIN, ADMINISTRATOR OF THE ESTATE OF DORIS PRIDGEN BOYKIN,
PLAINTIFF V. IPBI KIM; ASSOCIATED ALLERGY CENTER, INC., DEFENDANTS

No. COA05-102

(Filed 1 November 2005)

1. Evidence— cross-examination not allowed—other testimony—harmless error

Any error in not allowing cross-examination of plaintiff's expert in a medical malpractice action as to whether a former codefendant had met the standard of care was harmless where several other experts gave equivalent testimony.

2. Medical Malpractice— insulating negligence—instruction not given

The trial judge did not err by failing to instruct the jury on insulating negligence where that theory was not pled and it was not evident from the record that both parties understood the issue to be tried by implied consent.

3. Medical Malpractice— instructions—proximate cause and joint liability—not misleading in context

The jury was not misled in a medical malpractice action by instructions on proximate cause and joint and several liability. All of the instructions came directly from the North Carolina Pattern Jury Instructions and it cannot be shown that the instructions, in context, were misleading.

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4. Judgments— prejudgment interest—awarded before settlement setoff

Prejudgment interest is to be awarded before the set-off for a settlement amount; assuming preservation of the issue for appeal, there was no error in a medical malpractice action in the assignment of interest and costs between two doctors, one of whom had settled earlier. It would be contrary to the plain meaning of N.C.G.S. § 1B-4 to allow the settling party to be liable beyond the consideration in the release.

Appeal by defendants from judgment entered 7 June 2004 and order entered 28 June 2004 by Judge Gary L. Locklear in Cumberland County Superior Court. Heard in the Court of Appeals 21 September 2005.

The McLeod Law Firm, P.A., by Joe McLeod and William W. Aycock, Jr., for plaintiff appellee.

Walker, Clark, Allen, Grice & Ammons, L.L.P., by Jerry A. Allen, Jr., and O. Drew Grice, Jr., for defendant appellants.

McCULLOUGH, Judge.

Defendants Dr. Ipbi Kim and Associated Allergy Center (Dr. Kim) appeal from judgment entered 7 June 2004 and order entered 28 June 2004 by Judge Gary L. Locklear in Cumberland County Superior Court. We find no error.

FACTS

This is a wrongful death action based upon alleged medical malpractice brought by the administrator of the estate of Doris Boykin (“the estate”) against Dr. Kim, Associated Allergy Center, Inc., Dr. Wilburn and Caromed Family Practice, P.A. On 8 June 2004 the estate took a voluntary dismissal with prejudice of their claims against defendants Dr. Wilburn and the Caromed Family Practice (Dr. Wilburn). The trial against the remaining defendants commenced on 3 May 2004. On 12 May 2004 the jury returned a verdict in plaintiff’s favor.

Doris Boykin (decedent) began having pulmonary problems in 2001 and sought treatment from her general family practitioner, Dr. Clinton Wilburn. Dr. Wilburn initially diagnosed decedent with bronchitis, but when her condition did not improve she sought treatment from an Ear, Nose and Throat specialist, Dr. Kim. In the initial

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visit to see Dr. Kim, decedent complained of several symptoms including hearing loss, nasal problems and a sore throat with hoarseness. Dr. Kim informed decedent she only treated ear, nose, throat and allergy related symptoms and that decedent would need to see an internist for general medical problems. Dr. Kim's initial diagnosis was allergic rhinitis.

Both doctors initiated treatment of decedent with prescriptions of several medications, both prescribing a form of steroids. The first dose was prescribed by Dr. Wilburn in October 2001 and the second was prescribed by Dr. Kim in November 2001. Decedent continued seeking treatment throughout December. When her condition did not improve, decedent again visited both doctors on 9 January 2002, and was administered an injection of steroids, Celestone, by Dr. Kim and prescribed steroids, Medrol, by Dr. Wilburn. There is no indication that the doctors were communicating or that either was aware that decedent was being prescribed steroids by both physicians. Decedent returned to see Dr. Wilburn in January and February 2002 still complaining of coughing. In February, Dr. Wilburn ordered a chest x-ray along with other radiology tests. The tests revealed that decedent's lungs had patch density which was consistent with infection.

On 18 March 2002, decedent returned to Dr. Kim's office where an examination of her throat revealed a large mass. At this time, Dr. Kim again administered steroid injections. Decedent received the steroid injections from Dr. Kim throughout April 2002 along with a prescription for the steroid Prednisone. In addition, decedent received a prescription for Prednisone, from Dr. Wilburn. Even though previous requests had been made for chest x-rays and blood work from Dr. Wilburn, Dr. Kim did not receive any of these requested reports until 19 April 2002 when she received the results of the tests performed in February by Dr. Wilburn, but still no blood work. This communication on 19 April 2002 was the only communication between the two treating physicians. Decedent again visited Dr. Kim on 2 May 2002 where upon review of the previous test results, Dr. Kim determined a possible lung infection. Steroid injections were again administered, however, the lung infection was not discussed even though Dr. Kim received no indication that it was being treated by Dr. Wilburn.

Decedent's last visit to Dr. Kim's office was on 15 May 2002 where she once more received the steroid treatment because it appeared to be working by decreasing the size of the mass. Dr. Wilburn then saw decedent for the last time on 16 May 2002 when he prescribed an oral steroid with a 20-day course. This was the last time decedent was

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seen by a physician. On 24 May 2002 decedent collapsed and died from exsanguination related to pulmonary tuberculosis. Both physicians had failed to detect the tuberculosis.

A verified complaint was filed by the estate of decedent against the two defendants, Dr. Wilburn and Dr. Kim, alleging negligence on the part of both defendants which was the proximate cause of the wrongful death of decedent. Subsequently, an answer and demand for jury trial was filed by Dr. Kim alleging that all treatment was in accordance with the proper standard of care and that her actions were not the proximate cause of decedent's death. An answer also was filed by Dr. Wilburn alleging conformance to the appropriate standard of care and denying that any conduct contributed to this defendant was the proximate cause of decedent's death. Before trial ensued, one defendant, Dr. Wilburn, entered into a release from all liability for the consideration of \$1,500,000.00. A voluntary dismissal of all claims with prejudice against Dr. Wilburn was filed by the estate on 8 June 2004.

At trial, both sides presented expert testimony that tended to show both Dr. Wilburn and Dr. Kim failed to act in accordance with the proper standard of care in their communities. Before the trial began, the estate had designated several expert witnesses, some of whom were to testify in regard to Dr. Kim and others in regard to Dr. Wilburn. At trial, one of those expert witnesses, Dr. Steginsky, was called to testify. Dr. Kim on cross-examination wanted to elicit testimony that Dr. Wilburn, the former codefendant, had failed to comply with the proper standard of care. The court excluded this testimony upon objection by the estate. Dr. Kim then conducted *voir dire* of Dr. Steginsky in which the witness was asked whether he had an opinion to a reasonable degree of medical certainty as to whether Dr. Wilburn had breached the applicable standard of care:

I believe that [Dr. Wilburn] breached the standard of care by not recognizing that an upper lobe infiltrate was possibly consistent with tuberculosis and to do the further appropriate investigation or enlisting the support of a specialist to help reach a timely diagnosis. I further believe that his administration of steroids contributed to the death of [decedent].

I believe that he failed to communicate with Dr. Kim, and his failure to communicate with Dr. Kim led to the over-administration

. . . .

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I believe that his failure to communicate with Dr. Kim also contributed to the co-administration of steroids.

Later in the trial, Dr. Kim was permitted to cross-examine another expert witness of the estate, Dr. Foster, as well as some of her own expert witnesses, Dr. Dave and Dr. Mansfield, who testified that Dr. Wilburn had breached the standard of care and that in fact his actions had fallen far below the standard of care.

At the conclusion of the trial, a charge conference was held in which Dr. Kim requested the court to instruct the jury on insulating negligence. The estate objected to this instruction on the ground that no issue of insulating negligence had been presented by evidence at trial. Dr. Kim acknowledged that insulating negligence had not been pled but stated that it had been raised by the evidence and therefore an amendment should be allowed because it was a substantive issue raised at trial. The court denied the request and excluded any instruction on insulating negligence. Also, at the charge conference Dr. Kim raised several objections to jury instructions regarding proximate cause and joint and several liability. The court in providing the law to the jury, gave several instructions which made reference to the issues of proximate cause and joint and several liability. The first instruction as to proximate cause read:

[I]n defining proximate cause, there may be two or more proximate causes of an injury. This occurs when separate and independent acts or omissions of different people combine to produce an injury. Thus, if the negligent acts or omissions of two, or even more people for that matter, combine to produce an injury, the injury complained of and ultimate death of [decedent], the conduct of each person would be a proximate cause even though one person may have been more or may have been less negligent than the other.

Immediately following this instruction was the instruction on joint and several liability to which Dr. Kim objected:

Under joint and several liability, a person may seek to recover his, or her in this case, if you will, amount of damages from only one or two persons he claims is negligent, or he may seek to recover his entire amount of damages from both persons alleged to be negligent. However, regardless of whether the plaintiff seeks to recover damages from one person or from more than one person, plaintiff is only entitled to one recovery of damages.

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Thus, the amount awarded as damages is the total amount that the plaintiff can recover from any person. You should not be concerned with how the total amount of damages, if any, which you award, based upon the evidence, may be apportioned among persons who are jointly and severally liable to the plaintiff and whether or not all such persons are defendants at this trial.

After making these two instructions, the trial judge lost his place and repeated the exact instruction on defining proximate cause, *supra*. The court then in a final proximate cause instruction stated to the jury:

Now, there may be one or more proximate causes of an injury; therefore, the plaintiff need not prove that the defendants' negligence was the sole proximate cause of the injury. The plaintiff must prove, by the greater weight of the evidence, only that the defendants' negligence was a proximate cause.

Dr. Kim renewed all objections to the jury charges at the conclusion of the instructions. The jury returned a verdict on 12 May 2004, finding that decedent was injured as a result of the negligence of Dr. Kim and the Associated Allergy Clinic with which she was associated and awarded the estate of decedent \$2,000,000.00.

After the verdict was read to the parties, the estate made a motion to tax the costs of the action to Dr. Kim. Dr. Kim made no objection. A judgment of \$500,000.00 was entered against Dr. Kim reflecting the \$1,500,000.00 credit due to the settlement by Dr. Wilburn on 7 June 2004 by Judge Gary L. Locklear. The estate made a verified motion to tax costs to Dr. Kim setting forth the total costs as \$29,283.17 on 1 June 2004. Pre-judgment interest was also calculated in total as \$209,097.72 and then an interest credit was given for the amount of interest earned on Dr. Wilburn's settlement, \$14,904.24, for a net of \$194,193.48. An order was then entered by Judge Gary L. Locklear on 28 June 2004 taxing costs to Dr. Kim.

Dr. Kim now appeals.

ANALYSIS

I

[1] On appeal Dr. Kim contends that the trial court erred in failing to allow cross-examination of plaintiff's expert as to whether the former codefendant (Dr. Wilburn) acted in accordance with the standard of care. Even assuming *arguendo* that the trial court erred in excluding

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this testimony, the error was harmless and unprejudicial and therefore we disagree. Accordingly, we find no error.

N.C. Gen. Stat. § 90-21.12 permits a physician, otherwise qualified under Rule 702 of the North Carolina Rules of Evidence, to testify regarding the applicable standard of care in a medical malpractice case “ ‘when that physician is familiar with the experience and training of the defendant, and either: (1) the physician is familiar with the standard of care in the defendant’s community, or (2) the physician is familiar with the medical resources available in the defendant’s community and is familiar with the standard of care in other communities having access to similar resources.’ ” *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004), *disc. review allowed*, 359 N.C. 410, 612 S.E.2d 316 (2005). Testimony regarding a former codefendant’s standard of care is relevant to the issue of proximate cause and not unduly prejudicial. *See Lumley v. Capoferi*, 120 N.C. App. 578, 584, 463 S.E.2d 264, 268 (1995) (stating that evidence of a former codefendant’s standard of care is relevant to show that the present defendant’s conduct was not the proximate cause of the injury).

However, in considering the issue on appeal, we must consider whether the error was harmless. “The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.” *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002), *disc. review denied*, 357 N.C. 66, 579 S.E.2d 107 (2003). The denial of Dr. Steginsky’s testimony in regard to Dr. Wilburn’s compliance with the standard of care is juxtaposed with testimony by several other experts for both Dr. Kim and the estate consisting of evidence of tantamount substance and is therefore harmless. *See State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995) (any error in exclusion of evidence is harmless where evidence of the same import was admitted through the testimony of other witnesses). It cannot be said that a different outcome would have resulted. Therefore, this assignment of error is overruled.

II

[2] Dr. Kim also contends that the trial judge erred in failing to instruct the jury on insulating negligence and further that the jury instructions were misleading. We disagree.

Failure to plead an affirmative defense ordinarily results in waiver thereof. The parties may, however, still try the issue by express or implied consent. *See Nationwide Mut. Insur. Co. v.*

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Edwards, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984). N.C. Gen. Stat. § 1A-1, Rule 15(b) provides, in pertinent part: “When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” Our Supreme Court discussed the application of N.C. Gen. Stat. § 1A-1, Rule 15(b) as follows:

[T]he implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

Eudy v. Eudy, 288 N.C. 71, 77, 215 S.E.2d 782, 786-87, *overruled on other grounds*, *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982); *Mobley v. Hill*, 80 N.C. App. 79, 81, 341 S.E.2d 46, 47-48 (1986).

However, where the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue. *Munchak Corp. v. Caldwell*, 37 N.C. App. 240, 246 S.E.2d 13, *cert. denied*, 295 N.C. 647, 248 S.E.2d 252 (1978). Insulating negligence is “a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote.” *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 236, 311 S.E.2d 559, 566 (1984) (citation omitted). “It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury.” *Id.*

Upon review of the entire record on appeal and transcript, it is apparent that all of the evidence presented at trial tended to support the properly pled issues of proximate cause and joint and several liability. The gravamen of Dr. Kim’s argument is that she would have preferred the jury to interpret the evidence presented at trial in her favor, finding that Dr. Wilburn’s negligence was the proximate cause of Mrs. Boykin’s death rather than her own negligence. Insulating negligence was not pled in this case by Dr. Kim and it is not evident from the record that both parties understood this issue to be tried by implied consent. Where the evidence tended to show independent acts of negligence by two parties which united to cause a single injury, the doc-

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trine of trial by implied consent should not have been invoked in this instance and there was no error in excluding an instruction on insulating negligence. *See State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550, *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998) (stating that the trial court need only give a requested instruction which is supported by the evidence).

[3] Dr. Kim further contends that the jury was misled by the instructions on the law regarding proximate cause and joint and several liability.

On appeal, this Court considers a jury charge contextually and in its entirety. *Jones v. Development Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972). The charge will be held to be sufficient if “it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed” *Id.* at 86-87, 191 S.E.2d at 440. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917, *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). “Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *Id.*

In the instant case, all of the jury instructions regarding proximate cause which were objected to came directly from the North Carolina Pattern Jury Instructions.¹ It cannot be said that it was error for the judge to state the law correctly to the jury nor that it was error for the judge to mistakenly repeat the correct law to the jury. *See State v. Orr*, 260 N.C. 177, 132 S.E.2d 334 (1963) (stating that an inadvertent mistake by the trial judge, which is later corrected, is harmless error).

Also, in instructing the jury on joint and several liability and its impact on damages, it cannot be shown that taken in context with the entire charge, it misled the jury. The instruction given by the judge was:

Under joint and several liability, a person may seek to recover his, or her in this case, if you will, amount of damages from only one

1. The proximate cause instructions were taken directly from N.C.P.I.—Civil 102.27 and N.C.P.I.—Civil 102.19, respectively.

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or two persons he claims is negligent, or he may seek to recover his entire amount of damages from both persons alleged to be negligent. However, regardless of whether the plaintiff seeks to recover damages from one person or from more than one person, plaintiff is only entitled to one recovery of damages. Thus, the amount awarded as damages is the total amount that the plaintiff can recover from any person. You should not be concerned with how the total amount of damages, if any, which you award, based upon the evidence, may be apportioned among persons who are jointly and severally liable to the plaintiff and whether or not all such persons are defendants at this trial.

This was a case of complex medical issues in which throughout the trial, allusions were made to another doctor's negligence. It was only fair that the judge give an instruction on how to treat the allusions to this ever-looming, non-present figure in regard to damages. We conclude that, taken in their entirety, the jury charges were not misleading to the jury. Therefore, this assignment of error is overruled.

III

[4] Lastly, Dr. Kim contends that the trial judge erred in requiring Dr. Kim to pay all pre-judgment interest and costs. We disagree.

In the instant case, Dr. Kim failed to make any objection on the record as to the imposition of costs and pre-judgment interest or the apportionment thereof. Therefore, the assignment of error was not preserved. *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005); N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . ."). However, assuming *arguendo* that the error was preserved for appeal, this Court finds no error.

A release of one liable party in a wrongful death action reduces the claim against the remaining parties to the extent of the amount of consideration paid for the release. N.C. Gen. Stat. § 1B-4(1) (2003). In addition, the release discharges the former party from all contribution liability as to the remaining parties. N.C. Gen. Stat. § 1B-4(2). After the jury renders a verdict against a party, a judge must then determine and render the final judgment. *See Hieb v. Lowery*, 344 N.C. 403, 410, 474 S.E.2d 323, 327 (1996). It is clear and unambiguous that "judgment," given its plain meaning, "indicates the final amount

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of money due to the plaintiff, consisting of the verdict, costs, fees, and interest.” *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998). Further, N.C. Gen. Stat. § 24-5 mandates that the “portion of money judgment designated by the fact finder as compensatory damages bears interest.” N.C. Gen. Stat. § 24-5(b) (2003).

This Court must give the language of a statute its plain and ordinary meaning where the words chosen by the legislature to comprise the law are clear and unambiguous. *See Hyler v. GTE Products Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). In construing the statutes *in pari materia*, the entire amount of compensatory damages bears interest, rather than the “compensatory portion *minus settlements*.” *Brown*, 349 N.C. at 523-24, 507 S.E.2d at 896. Dr. Kim argues that costs and pre-judgment interest should be apportioned pro rata, however, the plain meaning of the statute does not support this. It is clear that pre-judgment interest is to be awarded before a set-off is given for the settlement amount. *See Brown*, 349 N.C. 520, 507 S.E.2d 894 (holding pre-judgment interest is to be determined on the entire amount of compensatory damages and then reduced by the amount of interest which would have accrued at present value on the settlement amount determined before trial)². It would be contrary to the plain meaning of the statute to determine that N.C. Gen. Stat. § 1B-4 allows the settling party to be liable beyond the amount of consideration set forth in the release. Where the trial court determined costs and interest before entitling the party defendant, Dr. Kim, to set-off, any remaining balance on the judgment was the proper amount for which Dr. Kim is liable. We find no error.

Accordingly, we find no error in the exclusion of testimony by Dr. Steginsky in regard to Dr. Wilburn’s standard of care, exclusion of the jury instruction on insulating negligence or the jury instructions as a whole, and we also find no error in the taxing of costs and interests to defendant.

No error.

Judges McGEE and JACKSON concur.

2. The case stated as a matter of policy that pre-judgment interest was to compensate the plaintiff for the loss of use of plaintiff’s money and that where a plaintiff had no loss of use of money which was awarded by settlement before trial, the defendant party at trial was entitled to a set-off for interest on the portion of the award already paid to the plaintiff.

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STATE OF NORTH CAROLINA v. MICHAEL LANE McHONE

No. COA04-1605

(Filed 1 November 2005)

1. Homicide— first-degree murder—eliminating option of not guilty—new trial

The trial court committed plain error by omitting the option of not guilty of first-degree murder in its final mandate to the jury and on the verdict sheet, and defendant is entitled to a new trial, because: (1) the trial court neither stated that the jury could find defendant not guilty of first-degree murder, nor that it was its duty to do so should it conclude the State failed in its burden of proof; (2) the trial court did not, as an alternative to a not guilty mandate, instruct the jury to answer no to the first issue on the verdict sheet should it not find any one or more of the elements of murder missing; (3) the trial court essentially pitted one theory of first-degree murder against the other and impermissibly suggested that the jury should find that the killing was perpetrated by defendant on the basis of at least one of the theories; (4) telling the jury not to return a verdict of guilty as to each theory of first-degree murder does not comport with the necessity of instructing the jury that it must or would return a verdict of not guilty should it completely reject the conclusion that defendant committed first-degree murder; (5) the verdict sheet itself did not provide a space or option of not guilty; (6) rather than help correct the failure to provide a similar not guilty mandate with respect to the first-degree murder charge, the presence of a not guilty final mandate as to the armed robbery/larceny offenses likely reinforced the suggestion that the jury should return a verdict of first-degree murder based upon premeditation and deliberation and/or felony murder; (7) the content and form of the verdict sheet on the taking offenses which did afford a space for a not guilty verdict also likely reinforced the suggestion that defendant must have been guilty of first-degree murder on some basis; and (8) the fact there was plenary evidence upon which the jury might return a verdict of guilty does not remedy the failure to provide a not guilty mandate.

2. Robbery— armed—taking property after victim's death—sufficiency of evidence

The trial court did not err by failing to dismiss the armed robbery charge against defendant based on alleged insufficient evi-

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dence, because: (1) the fact that the victim is already dead when her possessions are taken has not previously been an impediment in this jurisdiction to the defendant's conviction for armed robbery; and (2) two witnesses testified that defendant told them he killed the victim.

Appeal by defendant from judgments entered 29 March 2004 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 23 August 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Jill Ledford Cheek and Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Janet Moore, for defendant.

LEVINSON, Judge.

Defendant appeals from convictions and judgments for first degree murder and armed robbery. We find no error in part, and reverse and remand in part.

The evidence presented at trial may be summarized as follows:

On the morning of 14 November 2000, Tammy Cush was discovered dead in her apartment. Her husband returned home and found his wife's naked body lying in their bedroom. She had two stab wounds to the neck which, according to expert testimony, caused her death. A jar of coins was spilled on the living room floor. Silver coins from this jar were missing, as were the Play Station and VCR. Mrs. Cush's purse had been emptied of the money inside, and food was strewn on the kitchen floor. A trail of vegetables led towards defendant's apartment. The victim's VCR and Play Station were found in defendant's apartment.

In response to police questioning the next day, defendant admitted having entered the victim's home on the evening of 13 November 2000. He stated he had seen Mrs. Cush lying naked in the bedroom with a hole in her neck trying to breathe. Defendant contended that he slipped in a pool of warm blood, vomited in the toilet, took the VCR and Play Station, and returned to his apartment.

Ronald Pritt testified that defendant told him he killed the victim. Pritt was incarcerated in jail at the same time defendant was incar-

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cerated at the Catawba County jail. Defendant told Pritt that, on the night of the murder, he went to Mrs. Cush's apartment intending to kill her husband. Mrs. Cush backed out of "the plotting and planning to kill her husband", and defendant returned to his apartment. Later, defendant explained, he "forgot something" and returned to Mrs. Cush's apartment with a pair of scissors. When he walked in the door, Mrs. Cush had "started yelling at him, throwing her—all wild, and he blanked out and when he came back to, he had blood all over him. She was laying on the floor." Defendant told Pritt he had asked "the Gideons" who visited the prisoners in jail to pray that Mrs. Cush's killer would be found because it would "throw the officers off, saying he didn't do it."

Robert Howie testified that defendant told him he had killed his girlfriend. Howie was incarcerated in jail at the same time defendant was incarcerated at the Catawba County jail. Defendant said his girlfriend "had broke[n] up with him and he wanted to have sex with her one more time." When she refused to have intercourse with him, "[h]e lost it and stabbed her in the neck, turned her over, and had sex with her." Defendant also told Howie he had spilled a jar of coins in the victim's apartment and had gone through the coins looking for money to buy beer.

Defendant presented no evidence.

After denying defendant's request to submit second degree murder to the jury, the court instructed the jury on first degree murder on the theories of malice, premeditation and deliberation and the felony murder rule. In addition, the court instructed the jury on robbery with a dangerous weapon and the lesser-included offense of larceny. The jury convicted defendant of first degree murder based upon both theories, and robbery with a dangerous weapon. For first degree murder, defendant was sentenced to life imprisonment without parole; for the armed robbery, defendant was sentenced to 77-102 months imprisonment. From these convictions and judgments, defendant appeals.

[1] Defendant first argues the trial court committed plain error by eliminating the option of not guilty of first degree murder in its final mandate to the jury and, in a related argument, by omitting the option of not guilty of first degree murder on the verdict sheet.¹ Defendant

1. On appeal, the State has not responded to Defendant's argument concerning the failure of the trial court, in its instructions, to inform the jury that it had an obligation to return a verdict of not guilty should the State fail to meet its burden of proof as to the offense of first degree murder.

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argues these omissions so tainted the proceedings against him that a new trial on the first degree murder charge is required. After very careful review, we are compelled to agree.

The underlined portions of the following instructions given by the trial court play a significant role in our evaluation of this assignment of error:

The Defendant has entered pleas of not guilty as to each charge. The fact that he has been charged is no evidence of guilt. Under our system of justice when a Defendant pleads not guilty, he is not required to prove his innocence. He is presumed to be innocent. The State must prove to you that the Defendant is guilty beyond a reasonable doubt.

....

You should weigh all the evidence in the case. After weighing all of the evidence if you are not convinced of the guilt of the Defendant beyond a reasonable doubt you must find him not guilty.

....

Ladies and gentlemen, the Defendant has been charged with first-degree murder. Under the law and the evidence in this case, it is your duty to return one of the following verdicts: guilty of first-degree murder or not guilty.

You may find the Defendant guilty of first-degree murder on either or both of two theories; that is, on the basis of malice, premeditation, and deliberation or under the first-degree felony murder rule.

....

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant, acting with malice, killed the victim with a deadly weapon thereby proximately causing the victim's death and that the Defendant intended to kill the victim and that the Defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation.

If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of

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first-degree murder on the basis of malice, premeditation, and deliberation. Whether or not you find the Defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether he is guilty of first-degree murder under the first-degree felony murder rule.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant committed the offense of robbery with a dangerous weapon and that while committing the offense of robbery with a dangerous weapon the Defendant killed the victim and that the Defendant's act was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first-degree murder under the felony murder rule.

Now, ladies and gentlemen, the verdict form with respect to the charge of first-degree murder sets out first-degree murder both on the basis of malice, premeditation, and deliberation and first-degree murder under the felony murder rule.

In the event that you should find the Defendant guilty of first-degree murder, please have your foreperson indicate whether you did so on the basis of malice, premeditation, and deliberation or the felony murder rule or both.

As to armed robbery and the lesser-included offense of larceny, the trial court instructed the jury, in pertinent part, as follows:

The Defendant has also been charged with robbery with a dangerous weapon, which is taking and carrying away the personal property of another from his or her person or in his or her presence without his or her consent by endangering or threatening a person's life with a dangerous weapon, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.

. . . .

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant had in his possession a dangerous weapon and took and carried away [the personal property of another] from the person or in the presence of a person without her voluntary consent by endangering or threatening her

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life with the use or threatened use of a dangerous weapon, the Defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a dangerous weapon.

If you do not find the Defendant guilty of robbery with a dangerous weapon or have a reasonable doubt as to one or more of these things, it would be your duty to consider whether the Defendant is guilty of larceny.

. . . .

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant took and carried away another person's property without her consent knowing that he was not entitled to take it and intending at the time to deprive the victim of its use permanently, it would be your duty to return a verdict of guilty.

If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to that charge.

Because defendant did not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error. *See State v. Walker*, 170 N.C. App. 632, 636, 613 S.E.2d 330, 333 (2005).

Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996).

"It is well established that 'the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct.'" *State v. Hornsby*, 152 N.C. App. 358, 367, 567 S.E.2d 449, 456 (2002) (quoting *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984)), *appeal dismissed*, 356 N.C. 685, 578 S.E.2d 316 (2003). "Regardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence. The trial judge may in his

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discretion also instruct on the subordinate and nonessential features of a case without requests by counsel.” *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982) (citing *State v. Ward*, 300 N.C. 150, 266 S.E.2d 581 (1980)).

Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error. *See, e.g., Ward*, 300 N.C. at 155, 266 S.E.2d at 584 (where presiding judge was required to “declare and explain the law arising on the evidence” to the jury under N.C. Gen. Stat. § 15A-1232, the trial court’s failure to do so, together with its failure to give a final mandate to the effect that the jury had a duty to return a verdict of not guilty if they had a reasonable doubt as to defendant’s guilt of second degree murder, resulted in new trial); *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962) (reversible error where court instructed jury on its duty to return a verdict of guilty if certain facts found to be true, but failed “to tell the jury that if they were not satisfied beyond a reasonable doubt that those were the facts, they would acquit”); *State v. Dallas*, 253 N.C. 568, 569, 117 S.E.2d 415, 416 (1960) (“At no time was the jury instructed that, if upon a fair and impartial consideration of the evidence they had a reasonable doubt of defendant’s guilt, it would be their duty to acquit him.”); *but see State v. Bridges*, 231 N.C. 163, 165, 56 S.E.2d 397, 398 (1949) (defense theory at trial was that the killing was in the nature of second degree murder and defendant acknowledged manslaughter was not implicated; even in absence of final not guilty option, first degree murder conviction sustained because, considering the charge as a whole, “jury was admonished that a presumption of innocence surrounded the defendant which remained with him up to the rendition of an adverse verdict against him”).

In *State v. Howell*, 218 N.C. 280, 282, 10 S.E.2d 815, 817 (1940), where the trial court erred, in part, by failing to instruct the jury that it could return a verdict of not guilty, the Supreme Court held:

When there is a general plea of not guilty and no admission of an unlawful killing the . . . penalty will be exacted only upon the verdict of a jury which has been given full opportunity to pass upon the weight and credibility of the evidence and only after it has been instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty.

Our Supreme Court recently relied upon *Ward*, and quoted the above language from *Howell*, in a case where the defendant argued the trial

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court failed to provide a not guilty verdict in its mandate. *See State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005). Finally, in *State v. Ramey*, 273 N.C. 325, 329, 160 S.E.2d 56, 59 (1968), the Court awarded a new trial based on the trial court's failure to properly instruct the jury on returning a verdict of not guilty:

[D]efendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon Mabry by defendant proximately caused his death. The trial judge inadvertently failed to give such [an] instruction. The necessity for such an instruction is not affected by the fact there was plenary evidence upon which the jury [might return a verdict of guilty].

. . . .

It is noted that no instruction was given that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of murder in the second degree, and failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of manslaughter, the jury should return a verdict of not guilty.

(citations omitted and emphasis added). In sum, our appellate precedent illustrates the importance placed upon the trial court's obligation to provide a not guilty final mandate to juries.

In the instant case, on the charge of first degree murder, the trial court failed to instruct the jury on the option of finding defendant not guilty during its final mandate.² Indeed, it neither stated that the jury could find defendant not guilty of first degree murder, nor that it was their duty to do so should they conclude the State failed in its burden of proof. And it did not, as an alternative to a "not guilty" mandate, instruct the jury to answer "no" to the first issue on the verdict sheet should it not find any one or more of the elements of murder missing:³

2. *See, e.g.*, North Carolina Pattern Jury Instruction 206.14 (Criminal): "If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty."

3. We need not comment on whether, in the absence of a final not guilty mandate, the verdict sheet utilized here could result in reversible error. *See, e.g., State v. Hicks*, 86 N.C. App. 36, 43, 356 S.E.2d 595, 599 (1987).

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We the jury unanimously find the Defendant, Michael Lane McHone:

1. Guilty of First Degree Murder?

ANSWER: yes

2. IF YOUR ANSWER IS “YES,” IS IT:

A. On the basis of malice, premeditation and deliberation?

ANSWER: yes

B. Under the first degree felony murder rule?

ANSWER: yes

We conclude the trial court’s failure to provide a not guilty final mandate constituted error, and next turn to whether this error constitutes plain error, requiring a new trial.

We first consider the jury instructions on murder in their entirety in determining whether the failure to provide a not guilty mandate constitutes plain error. The trial court judge correctly instructed the jury that if it did not find the requisite malice, premeditation and deliberation, it “would not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation” and must then consider whether the killing was done consistent with the requirements of the felony murder rule. Likewise, the concluding portion of the jury instruction on felony murder mirrored the one concerning malice, premeditation and deliberation in that it stated that the jury “[would] not return a verdict of guilty of first-degree murder under the felony murder rule[]” if the State failed in one or more of the elements of felony murder. The instruction, then, in the absence of a final not guilty mandate, essentially pitted one theory of first degree murder against the other, and impermissibly suggested that the jury should find that the killing was perpetrated by defendant on the basis of at least one of the theories. Telling the jury “not [to] return a verdict of guilty” as to each theory of first degree murder does not comport with the necessity of instructing the jury that it must or would return a verdict of not guilty should they completely reject the conclusion that defendant committed first degree murder.

Secondly, we consider the content and form of the first degree murder verdict sheet in determining whether the failure to provide a not guilty mandate constitutes plain error. Here, the trial court initially informed the jury that it was their “duty to return one of the fol-

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lowing verdicts: guilty of first-degree murder or not guilty.” However, the verdict sheet itself did not provide a space or option of “not guilty.” And while the content and form of the verdict sheet did not compel the jury to return a verdict of guilty insofar as it stated “if” it found defendant guilty of first degree murder, we repeat our observation that it failed to afford exactly that which the court initially informed the jury it would be authorized to return—a not guilty verdict.

Thirdly, we consider the instructions and verdict sheet for the armed robbery/larceny offenses in determining whether the failure to provide a not guilty final mandate for the murder charge constitutes plain error. As to these taking offenses, the trial court judge did provide a not guilty mandate. After instructing the jury that it must consider the offense of larceny should they reject the armed robbery, the court properly charged the jury, “If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to that charge.” Rather than help correct the failure to provide a similar not guilty mandate with respect to the taking offenses likely reinforced the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder. Likewise, the content and form of the verdict sheet on the taking offenses, which did afford a space for a not guilty verdict, also likely reinforced the suggestion that defendant must have been guilty of first degree murder on some basis:

We the jury unanimously find the Defendant, Michael Lane McHone:

✓ Guilty of Robbery with a Dangerous Weapon

or

___ Guilty of Larceny

or

___ Not Guilty

Our review of binding precedent suggests that, even where the trial court has given instructions on, *e.g.*, burden of proof, presumption of innocence, and/or provided some qualifying remarks such as “if the State has proven the elements you should return a verdict of guilty”, a new trial has been awarded for the failure to provide a not guilty final mandate. *See Ward*, 300 N.C. at 156, 266 S.E.2d at 585; *Ramey*, 273 N.C. at 327-29, 160 S.E.2d at 58-59; *Overman*, 257 N.C. at

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467-68, 125 S.E.2d at 923-24. Consequently, the fact the trial court judge provided similar instructions here does not necessarily foreclose the necessity of a new trial. And, as our Supreme Court's holding in *Ramey* informs, "the fact there was plenary evidence upon which the jury [might return a verdict of guilty]" does not remedy the failure to provide a not guilty mandate. *Ramey*, 273 N.C. at 329, 160 S.E.2d at 59.

We recognize that the jury could not have genuinely misunderstood its role in passing on the guilt or innocence of defendant. Even so, the trial court's inadvertent omission tipped the scales of justice in favor of conviction and impermissibly suggested that the defendant must have been guilty of first degree murder on some basis. We conclude that the jury instructions on first degree murder, considered in context and in their entirety, amount to plain error. This conclusion is based not only on the importance of the jury receiving a not guilty mandate from the presiding judge, but also on the form and content of the particular verdict sheets utilized in this case.

[2] Defendant next argues that the trial court erred by failing to dismiss the armed robbery charge against him due to insufficiency of the evidence. Defendant contends that the evidence shows he took the VCR and Play Station from the victim's apartment as an "afterthought," once the victim was already dead, and that therefore he did not take the objects "by use of a dangerous weapon." We disagree.

"In ruling on a motion to dismiss . . . the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995) (citation omitted).

When the defendant moves for dismissal, the court must determine if there is substantial evidence of each essential element of the crime charged . . . and evidence that defendant committed the offense. If the aforementioned evidence exists, the motion to dismiss is properly denied.

State v. Featherson, 145 N.C. App. 134, 138-39, 548 S.E.2d 828, 831 (2001) (quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)).

The essential elements of armed robbery are: "(1) the unlawful taking or an attempt to take personal property from the person or in

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the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened.” *State v. Willis*, 127 N.C. App. 549, 551, 492 S.E.2d 43, 44 (1997) (citation omitted); N.C. Gen. Stat. § 14-87 (2003). “That the victim is already dead when his possessions are taken has not previously been an impediment in this jurisdiction to the defendant’s conviction for armed robbery.” *State v. Fields*, 315 N.C. 191, 201, 337 S.E.2d 518, 524 (1985).

Where there is a continuous transaction, the temporal order of the killing and the taking is immaterial. Provided that the theft and the killing are aspects of a single transaction, it is immaterial whether the intent to commit the theft was formed before or after the killing.

State v. Handy, 331 N.C. 515, 528, 419 S.E.2d 545, 552 (1992).

In the instant case, the victim was found dead in her home with stab wounds from a sharp object to her neck. In a statement to the police, defendant admitted he entered the victim’s apartment, saw the victim lying naked in the bedroom with a hole in her neck trying to breathe, and took the victim’s VCR and Play Station. Police officers found the victim’s VCR and Play Station in defendant’s apartment. Pritt testified defendant told him that he had killed the victim. Howie testified defendant told him he had killed his girlfriend by stabbing her in the neck with a pair of scissors.

We hold there was substantial evidence to sustain a conviction of armed robbery against defendant. This assignment of error is overruled.

Defendant’s ineffective assistance of counsel argument is without merit, and his remaining arguments are either without merit or rendered moot as a result of this opinion.

In 00 CRS 19019, reversed and remanded for a new trial.

In 01 CRS 19538, no error.

Judges WYNN and CALABRIA concur.

N.C. BD. OF PHARMACY v. RULES REVIEW COMM'N

[174 N.C. App. 301 (2005)]

NORTH CAROLINA BOARD OF PHARMACY, PLAINTIFF v. THE RULES REVIEW
COMMISSION, *ET AL.*, DEFENDANT

No. COA04-929

(Filed 1 November 2005)

1. Pharmacists— working hours—regulation

Any regulation of pharmacies by N.C.G.S. §§ 90-85.6, 90-85.21, and 90-85.32 does not extend to regulating pharmacists' working hours. The trial court correctly ruled that plaintiff Board of Pharmacy was not acting within its authority when it adopted such a rule.

2. Constitutional Law— administrative rule review sought— constitutional challenge not raised

The trial court correctly refused to rule on plaintiff Board of Pharmacy's constitutional challenge to the authority of the Rules Review Commission (RRC) where plaintiff sought RRC approval but did not raise a constitutional challenge until after it received an unfavorable outcome.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by plaintiff from orders entered 6 February 2004 and 5 April 2004 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 19 April 2005.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, M. Denise Stanford, and Warren T. Savage, for plaintiff-appellant.

McMillan, Smith & Plyler, by William W. Plyler and Stephen T. Smith, for defendant-appellee.

Attorney General Roy Cooper, by Solicitor General Christopher G. Browning, Jr., and Special Deputy Attorney General Gary R. Govert, for defendant-intervenor-appellee.

Kennedy Covington Lobdell & Hickman, L.L.P., by Stanford D. Baird, William G. Scoggin, Ann M. Anderson, and Daniel J. Palmieri, for North Carolina Citizens for Business & Industry, North Carolina Home Builders Association, North Carolina Pork Council, Inc., North Carolina Retail Merchants Association, North Carolina Association of Realtors, Inc., and North Carolina Forestry Association, amici curiae.

N.C. BD. OF PHARMACY v. RULES REVIEW COMM'N

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Southern Environmental Law Center, by Donnell Van Noppen, III and Amy E. Pickle, for North Carolina Coastal Federation, North Carolina Shellfish Growers Association, Environmental Defense, and North Carolina Trout Unlimited, amici curiae.

Broughton Wilkins Sugg & Thompson, P.L.L.C., by Benjamin E. Thompson, III, for North Carolina Retail Merchants Association, amici curiae.

BRYANT, Judge.

The North Carolina Board of Pharmacy (plaintiff-Board of Pharmacy) appeals from two orders: (1) an order entered 6 February 2004, affirming the Rules Review Commission's¹ (defendant-RRC) objection to adopting the proposed 21 NCAC 46.2506 (Rule .2506)² and denying plaintiff's claims seeking validation of Rule .2506; and (2) an order entered 5 April 2004, denying plaintiff's Motion to Alter or Amend Judgment.

On 15 June 1998, plaintiff published Notice of Rule-Making Proceedings in the North Carolina Register giving notice that it was considering adopting rules addressing pharmacist working hours. On 14 August 1998, plaintiff published proposed Rule .2506 in the North Carolina Register and scheduled a public hearing. Following the hearing, plaintiff adopted the final language and submitted proposed Rule .2506 to RRC for consideration at its December 1998 meeting.

On 17 December 1998, the RRC objected to proposed Rule .2506 because it found that plaintiff lacked statutory authorization to enact this rule³. Plaintiff responded that it would not change proposed Rule

1. The RRC is an independent executive branch agency responsible for reviewing proposed administrative rules in accordance with Chapter 150B of the North Carolina General Statutes. N.C. Gen. Stat. § 143B-30.1-2 (2003). The RRC consists of ten members appointed by the General Assembly who review proposed agency rules to determine whether they meet the requirements set forth in N.C.G.S. § 150B-21.9(a) (2003). *See also*, N.C.G.S. § 143B-30.1(a) (2003).

2. Proposed Rule .2506 states "[a] permit holder shall not require a pharmacist to work longer than 12 continuous hours per work day. A pharmacist working longer than six continuous hours per work day shall be allowed during that time period to take a 30 minute meal break and one additional 15 minute break."

3. When a permanent rule is submitted for review, the RRC must determine whether the rule meets all of the following criteria: "(1) It is within the authority delegated to the [submitting] agency by the General Assembly[.]; (2) It is clear and unambiguous[.]; (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency . . . [; and] (4) It was adopted in accordance with [the APA's procedural requirements for rulemaking]." N.C. Gen. Stat. § 150B-21.9(a).

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.2506, and at its February 1999 meeting, the RRC decided not to remove its objection and returned proposed Rule .2506 to the Board of Pharmacy.

On 22 March 1999, plaintiff filed a Petition for Declaratory Ruling with the RRC, pursuant to section 150B-4 of the North Carolina General Statutes, seeking a declaration as to the validity of proposed Rule .2506. The RRC failed to issue any ruling or response to the Board of Pharmacy's Petition for Declaratory Ruling within sixty days, thereby resulting in a denial of the petition.

On 18 June 1999, plaintiff filed a complaint against the RRC and its members in their official capacities seeking a declaratory judgment that the RRC's actions were unconstitutional and that plaintiff had statutory authority to enact proposed Rule .2506. Also, plaintiff sought injunctive relief requiring the RRC to remove its objection and allow enactment of proposed Rule .2506. Plaintiff appeals.

Plaintiff's issues on appeal are whether the trial court erred: (1) by concluding plaintiff lacked the statutory authority to adopt proposed Rule .2506; and (2) by refusing to rule on its constitutional challenge to the authority of the RRC to veto the implementation of agency rules. We conclude the trial court did not err and affirm the judgment of the trial court.

Standard of Review

N.C. Gen. Stat. § 150B-1 *et seq.* governs both superior court and appellate court review of administrative agency decisions. *CVS Pharm., Inc. v. N.C. Bd. of Pharm.*, 162 N.C. App. 495, 498-99, 591 S.E.2d 567, 569 (2004). Our Supreme Court has recently reiterated the standard of judicial review of final agency decisions:

On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. Under the APA, an agency's final decision may be reversed or modified only if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;

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- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004) (citations omitted). "Questions of law receive *de novo* review," whereas fact-intensive issues "such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *Id.* Thus where a party alleges that an agency's decision is based upon an error of law, is in excess of the agency's statutory authority, was made upon unlawful procedure, or is in violation of constitutional provisions, pursuant to N.C. Gen. Stat. § 150B-51(b)(1)-(4), the court must undertake *de novo* review. *Id.* "Under the *de novo* standard of review, the trial court 'consider[s] the matter anew [] and freely substitutes its own judgment for the agency's.' *Id.* at 660, 599 S.E.2d at 895.

I

[1] Plaintiff first alleges the trial court erred by concluding plaintiff lacked the statutory authority to adopt proposed Rule .2506. We disagree.

In examining whether an agency erred in interpreting a statute it administers, an appellate court employs a *de novo* review. *County of Durham v. North Carolina Dep't of Env'tl. & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998) (citation omitted). Legislative intent controls the meaning of statutes. *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 345, 563 S.E.2d 92, 97 (2002) (citation omitted). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998). When interpreting a statute, the court first looks to the statute's plain meaning. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 510 S.E.2d 159 (1999).

Plaintiff, N.C. Board of Pharmacy, is the occupational licensing board for North Carolina pharmacists and the executive branch agency responsible for the enforcement of the North Carolina Pharmacy Practice Act. N.C. Gen. Stat. § 90-85.2 *et seq.* (2003). The

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General Assembly created the Board of Pharmacy for a defined purpose and conferred upon it specific duties:

Creation.—The responsibility for enforcing the provisions of this Article and the laws pertaining to the distribution and use of drugs is vested in the Board. The Board shall adopt reasonable rules for the performance of its duties. The Board shall have all of the duties, powers and authorities specifically granted by and necessary for the enforcement of this Article, as well as any other duties, powers and authorities that may be granted from time to time by other appropriate statutes.

N.C. Gen. Stat. § 90-85.6(a) (2003). Proposed Rule .2506 states:

A permit holder shall not require a pharmacist to work longer than 12 continuous hours per work day. A pharmacist working longer than six continuous hours per work day shall be allowed during that time period to take a 30 minute meal break and one additional 15 minute break.

Plaintiff argues it has the duty to regulate pharmacies, and, therefore, has the authority to adopt proposed Rule .2506. Plaintiff cites its statutory rule making authority under N.C.G.S. §§ 90-85.6, 90-85.21 and 90-85.32. As the trial court concluded, and upon our review of these statutes, any regulation of pharmacies does not extend to regulating working hours as set out in proposed Rule .2506. According to N.C.G.S. § 90-85.6(a), the Board shall have “all of the duties, powers and authorities *specifically granted by* and necessary for the enforcement” of the Act. (Emphasis added). The Act does not specifically grant plaintiff the authority to regulate working hours at a pharmacy. As such, N.C.G.S. § 90-85.6(a) does not provide authority for the Board of Pharmacy to enact proposed Rule .2506. We note that Chapter 90 of the North Carolina General Statutes deals with medicine and allied occupations such as dentistry, optometry, chiropractic, nursing, occupational therapy and massage therapy. Each of these professions is regulated because each affects the public health, safety and welfare. For each profession, the North Carolina General Assembly created a regulatory board to issue licenses and discipline licensees. However, a careful review of these statutes reveals that none of these regulatory boards has authority to regulate working hours of its licensees. Absent specific authority, plaintiff cannot regulate the pharmacists’ working hours as stated in proposed Rule .2506.

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The second statute cited by plaintiff, N.C. Gen. Stat. § 90-85.21(a), requires that “each pharmacy in North Carolina shall annually register with the Board . . . [and] identify . . . all pharmacy personnel employed in the pharmacy.” N.C.G.S. § 90-85.21 (2003). However, this statute, construed liberally and given its plain meaning, does not lead to the conclusion that the Board has authority to regulate working hours at a pharmacy.

The third statute cited by plaintiff, N.C.G.S. § 90-85.32(a), authorizes the Board of Pharmacy to “adopt rules governing the filling, refilling and transfer of prescription orders” in an effort to “assure the safe and secure distribution of drugs.” *See e.g. Sunscript Pharm. Corp. v. N.C. Bd. of Pharm.*, 147 N.C. App. 446, 555 S.E.2d 629 (2001) (finding Act gave authority for Board of Pharmacy to discipline a permit holder for conduct of pharmacist in the filling of a prescription). However, setting limits on the number of hours a pharmacist can work and requiring breaks for meals and otherwise, clearly does not concern the filling, refilling and transfer of prescriptions. The North Carolina Department of Labor is the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation is solely through the Wage and Hour Act:

The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.

N.C. Gen. Stat. § 95-25.1(b) (2003). The Wage and Hour Act makes it clear that legislation is necessary to regulate working hours. As such, the Board is not authorized to adopt a rule such as proposed Rule .2506 in an attempt to regulate working hours.

Finally, the General Assembly gave the Commission the authority to determine whether a proposed rule is within the authority delegated to the agency by the legislature. *See* N.C.G.S. § 150B-21.9(a)(1) (2003). The Commission properly objected to proposed Rule .2506 as outside the authority of the Board of Pharmacy. Therefore, we uphold the trial court’s ruling that plaintiff was not acting within the authority delegated to it by the General Assembly. This assignment of error is overruled.

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II

[2] Plaintiff next contends the trial court erred by refusing to rule on its constitutional challenge to the authority of the RRC to veto the implementation of agency rules. We disagree.

A constitutional question is only properly reached when necessary for resolution of the case and unavoidable in any way. *Anderson v. Assimios*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (“[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.”). North Carolina “courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.” *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960). North Carolina appellate courts should not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the trial court. *State v. Wilkinson*, 344 N.C. 198, 221, 474 S.E.2d 375, 387 (1996). “It is not the role of the appellate courts to render advisory opinions in matters that are not properly before them.” *Carolinas Med. Ctr. v. Empls & Carriers Listed in Exhibit A*, 172 N.C. App. 549, —, 616 S.E.2d 588, 591 (2005) (citing *Wiggins v. Pyramid Life Ins. Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969)). Our Supreme Court has held:

The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. The principle is an application of the broader doctrine of quasi-estoppel, which states that where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.

Shell Island Homeowners Ass’n v. Tomlinson, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999) (citations and quotations omitted).

By proposing Rule .2506, the Board of Pharmacy sought the benefit of the RRC’s approval. However, the Board of Pharmacy did not challenge the constitutionality of the rule-making process outlined in Article 2A of Chapter 150B until the RRC objected to proposed Rule .2506. Only after the Board of Pharmacy received an unfavorable outcome did it allege the process was unconstitutional. The trial court

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did not err by refusing to rule on the Board of Pharmacy's constitutional challenge to the authority of the RRC.

This assignment of error is overruled.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge STEELMAN concurring in part and dissenting in part.

Judge TIMMONS-GOODSON concurred in this opinion prior to 31 October 2005.

STEELMAN, Judge, concurring in part and dissenting in part.

I concur in the majority's holding that the trial court did not err in refusing to rule on the constitutional question. However, I must respectfully dissent as to the portion of the opinion affirming the ruling of the trial court that the Pharmacy Board lacked authority to adopt Rule .2506.

The proposed rule in question reads as follows:

.2506 Pharmacist Work Conditions.

A permit holder shall not require a pharmacist to work longer than 12 continuous hours per work day. A pharmacist working longer than six continuous hours per work day shall be allowed during that time period to take a 30 minute meal break and one additional 15 minute break.

The statutes relevant to whether the Pharmacy Board has the authority to enact this proposed rule are as follows:

§ 90-85.6 Board of Pharmacy; creation; membership; qualification of members.

(a) Creation.—The responsibility for enforcing the provisions of this Article and the laws pertaining to the distribution and use of drugs is vested in the Board. The Board shall adopt reasonable rules for the performance of its duties. The Board shall have all of the duties, powers and authorities specifically granted by and necessary for the enforcement of this Article, as well as any other duties, powers and authorities that may be granted from time to time by other appropriate statutes.

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§ 90-85.21. Pharmacy permit

(a) In accordance with Board regulations, each pharmacy in North Carolina shall annually register with the Board on a form provided by the Board. The application shall identify the pharmacist-manager of the pharmacy and all pharmacy personnel employed in the pharmacy.

§ 90-85.32. Rules pertaining to filling, refilling, transfer, and mail or common-carrier delivery of prescription orders

(a) Except as otherwise provided in this section, the Board may adopt rules governing the filling, refilling and transfer of prescription orders not inconsistent with other provisions of law regarding the distribution of drugs and devices. The rules shall assure the safe and secure distribution of drugs and devices.

The majority opinion rests upon the assertion that “setting limits on the number of hours a pharmacist can work and requiring breaks for meals and otherwise, clearly does not concern the filling, refilling and transfer of prescriptions.” I disagree.

The accurate filling of prescriptions is an essential requirement of the practice of pharmacy. The North Carolina Pharmacy Practice Act (Article 4A of Chapter 90 of the North Carolina General Statutes) was enacted by the General Assembly, requiring mandatory licensure of pharmacists to “insure minimum standards of competency and to protect the public from those who might otherwise present a danger to the public health, safety and welfare.” N.C. Gen. Stat. § 90-85.2. Under N.C. Gen. Stat. § 90-85.6(a) the North Carolina Board of Pharmacy is charged with enforcing the provisions of the Pharmacy Practice Act. The majority asserts that there is no relationship between the continuous hours worked by a pharmacist and their ability to accurately perform their work. Clearly this is not correct. The consequences of an improperly filled prescription can be deadly to a customer. This was recognized by the North Carolina Board of Pharmacy when it enacted 21 NCAC 46.1811 effective 1 July 1996, which reads as follows:

Pharmacists shall not dispense and permit holders shall not allow a pharmacist to dispense prescription drugs at such a rate per hour or per day as to pose a danger to the public health or safety.

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The proposed rule is simply a refinement of the existing rule, setting forth specific guidelines for the consecutive hours to be worked by a pharmacist. As with 21 NCAC 46.1811, the proposed rule is limited to pharmacists, who are defined in N.C. Gen. Stat. § 90-85.3(p) as persons licensed to practice pharmacy.

The majority further argues that the sole entity with the authority to regulate working conditions for pharmacists is the Department of Labor, and the sole method of such regulation is through the Wage and Hour Act. N.C. Gen. Stat. § 95-25.1 *et seq.* The purpose of the Wage and Hour Act is to balance the welfare of workers, through insuring reasonable wages and working hours, against the competing needs of North Carolina businesses. *Amos v. Oakdale Knitting Co.*, 102 N.C. App. 782, 786, 403 S.E.2d 565, 567 *rev'd on other grounds*, 331 N.C. 348, 416 S.E.2d 166 (1992). Thus, the welfare interests protected by the regulation of hours under the Wage and Hour Act are those of the worker, not the consuming public.

State agencies other than the Department of Labor have the authority to regulate working hours for the purpose of protecting the general public from over-worked employees. For example, in an effort to prevent accidents, the Department of Transportation regulates the number of hours commercial truck drivers can operate their vehicles. N.C. Gen. Stat. §§ 20-377, 20-381; 19A N.C.A.C. 3D.0801(b)(1). In the instant case, the purpose of the proposed rule was the protection of the welfare of the general public from the hazards inherent in over-worked and over-tired pharmacists filling prescriptions. This regulation is well within the mandate granted the N.C. Pharmacy Board by the General Assembly.

In light of the purpose of the Pharmacy Practice Act, and the scope of authority given to the N.C. Board of Pharmacy under this Act, I would hold that the N.C. Pharmacy Board was authorized to enact the proposed rule and that the Rules Review Commission was in error in rejecting it.

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ALICE McCOY, PLAINTIFF v. JERRY COKER, INDIVIDUALLY AND JERRY COKER D/B/A JERRY COKER, AND JIMMY L. WADE, INDIVIDUALLY AND IN HIS CAPACITY AS A BUILDING INSPECTOR FOR THE COUNTY OF WAYNE, THE COUNTY OF WAYNE, THROUGH ITS MANAGER LEE SMITH, DEFENDANTS

No. COA04-1367

(Filed 1 November 2005)

1. Immunity— governmental—negligent building inspection—accidental—insurance coverage

An allegedly negligent building inspection was an accident under Wayne County's insurance policy, the policy covered the claim, immunity was waived, and the trial court properly denied the County's motion for summary judgment. Although the inspection and issuance of a certificate of occupancy were intentional, it was neither intended nor expected that plaintiff's property would be rendered uninhabitable and that plaintiff would suffer health problems.

2. Immunity— governmental—claims against building inspector and county—not duplicative—same immunity

The trial court did not err by denying a building inspector's motion to dismiss a claim against him in his official capacity where the County was not immune. The public officer holds the same immunity, if any, as the governmental immunity; although the building inspector here contended that claims were duplicative, a plaintiff may bring suit against both a governmental entity and its public officer (with but one recovery).

3. Immunity— governmental—building inspector—public official

The trial court should have dismissed a claim against a building inspector in his individual capacity because the inspector was a public official who may not be held personally liable for mere negligence. The inspector's position was created by statute, he exercised a portion of the sovereign power, and his work required discretion.

Appeal by defendants Wade and Wayne County from order denying motions to dismiss and for summary judgment entered 25 August 2004 by Judge Kenneth F. Crow in Wayne County Superior Court. Heard in the Court of Appeals 19 May 2005.

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Morgan, Reeves & Gilchrist, by C. Winston Gilchrist; and Law Offices of Jason Wunsch by Jason Wunsch, for plaintiff-appellee.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Scott C. Hart, for defendant-appellants Wade and Wayne County.

Albert D. Kirby, Jr., for defendant-appellant Jerry Coker.

STEELMAN, Judge.

Plaintiff's residence was damaged by fire on 29 April 1998. Plaintiff hired defendant Jerry Coker (Coker), an unlicensed contractor holding himself out as being licenced, to rebuild and repair her residence for \$62,000.00. Coker applied for a building permit from the Wayne County Inspections Department, listing the cost of repair for the residence at \$29,000.00, which was just under the \$30,000.00 limit requiring licensure. N.C. Gen. Stat. § 87-1 *et. seq* (2004). As Coker proceeded with the repairs, defendant Wayne County (Wayne County) periodically inspected the work. The majority of these inspections were conducted by defendant Jimmy L. Wade (Wade, and together with Wayne County, defendants). On 29 June 1999, Wade conducted a final inspection of the residence and issued a Certificate of Occupancy.

Plaintiff's complaint alleges multiple claims against each of the defendants. As to Coker, it is alleged that he performed faulty work, resulting in "extensive toxic mold growth" at the residence. As to defendants, plaintiff alleges negligence and gross negligence for failure to properly inspect Coker's work, wilful or negligent misrepresentations, and unfair and deceptive trade practices. Wade was sued in both his individual and his official capacity as a building inspector. Plaintiff seeks monetary damages for property damage, personal injuries, exemplary damages, and attorney's fees.

Plaintiff filed this action on 16 March 2004. Defendants filed answer and motions to dismiss on 6 May 2004. These motions sought dismissal of the claims against Wade in both his individual and official capacity. On 20 June 2004, defendants filed a motion for summary judgment based in governmental immunity. On 18 August 2004, the trial court dismissed plaintiff's claims against Wayne County for unfair and deceptive trade practices and denied the defendant's other motions to dismiss and for summary judgment. Defendants appeal. We affirm in part and reverse in part the order of the trial court.

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[1] In defendants' second argument they contend that the trial court erred in denying defendant Wayne County's motion for summary judgment based upon governmental immunity. We discuss this argument first because it is partially determinative of another issue. We disagree.

"Summary judgment is properly granted only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 202, 271 S.E.2d 54, 57 (1980) (citations omitted). "On appeal, our standard of review is (1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law." *NationsBank v. Parker*, 140 N.C. App. 106, 109, 535 S.E.2d 597, 599 (2000) (citation omitted). "The evidence presented is viewed in the light most favorable to the non-movant." *Id.*

"The court is not authorized by Rule 56 to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists." *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979) (citation omitted). "The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Id.* "Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Evans v. Hous. Auth. of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004). When a county purchases liability insurance, however, it waives governmental immunity to the extent it is covered by that insurance. N.C. Gen. Stat. § 153A-435(a) (2004). In the instant case, defendant County of Wayne purchased an insurance policy (the policy) from St. Paul Fire and Marine Insurance Co. (St. Paul).

The dispositive issue concerns whether that policy covered defendant Wayne County for the acts alleged in plaintiff's complaint. If the policy did provide coverage against the alleged negligent acts of Wayne County's building inspector, then Wayne County has waived its governmental immunity and its motion for summary judgment was properly denied. It is defendants' burden to show that no genuine issue of material fact exists that the policy does *not* cover Wade's

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actions in the instant case. *Marlowe v. Piner*, 119 N.C. App. 125, 127-28, 458 S.E.2d 220, 222 (1995).

The policy is comprised of multiple coverage sections, each providing different coverages, limits, and exclusions. Each coverage is self-contained and will be examined separately. Two policy sections are at issue in this appeal, the “Public Entity Management Liability Protection” section [R. pp. 44-51], and the “Public Entity General Liability Protection” section [R. pp. 154-77]. The “Public Entity Management Liability Protection” section includes a section titled **Exclusions—What This Agreement Won’t Cover.**

Injury or Damage. We won’t cover loss resulting from injury or damage.

Injury or Damage means:

- . . . personal injury . . .; or
- property damage.

Bodily Injury means any physical harm, including sickness or disease, to the physical health of any person.

Property Damage means:

- physical damage to tangible property of others, including all resulting loss of use of that property. . . .

This Court has held that exclusionary provisions such as this prevent recovery under a policy for damages due to negligent building inspection. *Norton v. SMC Bldg.*, 156 N.C. App. 564, 577 S.E.2d 310 (2003); *Kennedy v. Haywood County*, 158 N.C. App. 526, 529-30, 581 S.E.2d 119, 121 (2003). Thus as to the “Public Entity Management Liability Protection” section of the policy, there is no insurance coverage, and consequently no waiver of governmental immunity.

Wayne County also purchased coverage entitled “Public Entity General Liability Protection”. The section entitled **What This Agreement Covers** contains the following:

Bodily injury and property damage liability.

We’ll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:

- happens while this agreement is in effect; and
- is caused by an event.

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Event means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

We note that the definitions of bodily injury and property damage are substantively identical to the definitions in the “Public Entity Management Liability Protection Coverage” section above, and that there is no dispute that Wayne County is a “protected person” as defined in the policy. We also note that there is an extensive list of exclusions in this section of the policy, including breach of contract and deliberately breaking the law. This section of the policy does not, however, contain any exclusion for injury or damage similar to that contained in the “Public Entity Management Liability Protection” section discussed above. Defendants make no argument that the “Public Entity General Liability Protection” section of the policy does not apply.

If the negligent building inspection of Wade was an accident, then the policy provides coverage for the claims against Wayne County, and it has waived governmental immunity. The policy does not define “accident”. “Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning.” *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 816-17 (1999) (citations omitted), disc. review denied, 351 N.C. 350, 542 S.E.2d 205 (2000). “The words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company.” *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). “It is the general rule that where a provision in a policy of insurance is susceptible of two interpretations, when considered in light of the facts in the case, one imposing liability, the other excluding it, the provision will be construed against the insurer.” *Roach v. Pyramid Life Ins. Co.*, 248 N.C. 699, 701, 104 S.E.2d 823, 824-25 (1958).

“Policies of liability insurance as well as property and personal injury insurance frequently limit coverage to losses that are caused by ‘accident.’ In attempting to accommodate the layman’s understanding of the term, courts have broadly defined the word to mean an occurrence which is unforeseen, unexpected, extraordinary, either by virtue of the fact that it occurred at all, or because of the extent of the damage. An accident can be either a sudden happening or a slowly evolving process”

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BLACK'S LAW DICTIONARY (8th ed. 2004), quoting John F. Dobbyn, *Insurance Law in a Nutshell* 128 (1996). Under the definition of accident in *Black's* we also find a definition for "culpable accident": "An accident due to negligence." *Id.*

There are cases in North Carolina interpreting policy language similar, but not identical, to the relevant language in the instant case. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 694, 340 S.E.2d 374, 379 (1986); *Washington Hous. Auth. v. North Carolina Hous. Auths. Risk Retention Pool*, 130 N.C. App. 279, 285, 502 S.E.2d 626, 630 (1998); *Wiggins v. Monroe*, 73 N.C. App. 44, 326 S.E.2d 39 (1985); *Wilmington v. Pigott*, 64 N.C. App. 587, 307 S.E.2d 857 (1983); *Edwards v. Akion*, 52 N.C. App. 688, 691, 279 S.E.2d 894, 896 (1981). In all of the insurance policies in these cases, "event" (termed "occurrence") is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*" *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379 (emphasis added).

Much of the analysis in these cases focuses on whether the damages incurred were expected or intended by the insured in light of the conduct in question. In making that determination,

[t]he test should be "a subjective one, from the standpoint of the insured, and not an objective one asking whether the insured 'should have' expected the resulting damage," i.e., whether the resulting damage was unexpected or unintended, not whether the act itself was unintended. An "expected or intended" exclusion applies only "if the resulting injury as well as the act were intentional."

Washington Hous. Auth., 130 N.C. App. at 285, 502 S.E.2d at 630.

The *Washington Hous. Auth.* Court determined that a complaint properly alleged an "accident" under the relevant insurance policy where plaintiff alleged a government authority (Washington Housing Authority) charged with maintaining a low income housing project was negligent in its repair of plumbing leaks, termite control, and maintenance of the property grounds, all resulting in significant damages. In holding that this conduct constituted an "accident" under the policy, this Court reasoned that though Washington Housing Authority's actions were intentional, "the resulting damage to the property occasioned thereby was not." *Id.* at 285-86, 502 S.E.2d at 631. We hold that this reasoning applies in the instant case. Though

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defendant Wade's acts inspecting plaintiff's property and issuing a certificate of occupation were intentional, it was neither intended nor expected that as a result of these acts plaintiff's property would be rendered uninhabitable and plaintiff would suffer health problems. *Washington Hous. Auth.*, 130 N.C. App. at 285, 502 S.E.2d at 630.

We note that to the extent the language of the instant policy differs from that of the cited cases (by omitting "which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"), the case for defining "accident" under the policy as covering the instant facts is strengthened, not diminished. Further, even were we to conclude that it is impossible on the facts at bar to determine whether the conduct in the instant case constituted an "accident" under the policy, we would be compelled to hold in favor of coverage. *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522, *Roach*, 248 N.C. at 701, 104 S.E.2d at 824-25.

We hold that the policy covers the conduct in question, and that Wayne County has waived immunity to the extent of the insurance coverage purchased. The trial court properly denied the motion for summary judgment. This argument is without merit.

[2] In defendants' first argument, they argue that the trial court erred in denying defendant Wade's motion to dismiss. We agree in part.

Defendant Wade moved pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the claims against him in both his official and individual capacity. Defendants first contend that the trial court erred in failing to dismiss the claims against him in his official capacity because they are duplicative of plaintiff's claims against Wayne County. Defendants base their argument on cases such as *Moore v. City of Creedmoor*, 345 N.C. 356, 481 S.E.2d 14 (1997) and *Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000). Defendants are mistaken in this reliance. These cases simply hold that because "official-capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent[.]'" *Moore*, 345 N.C. at 367, 481 S.E.2d at 21 (citations omitted), the officer holds the same immunity, if any, that the governmental entity holds. Therefore, if the governmental entity is immune from suit, an officer properly acting in his official capacity is immune as well. *Reid*, 137 N.C. App. at 172, 527 S.E.2d at 90. This does not mean that a plaintiff may not bring suit against both the governmental entity and its officer. *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997). Of course, judgment against the officer would be recov-

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ered from the governmental entity, and plaintiff may have but one recovery. Because we have determined that Wayne County is not immune from suit, we must also hold that Wade is not immune in his official capacity. This argument is without merit.

[3] Defendants next argue that the trial court erred in failing to dismiss plaintiff's claims against Wade in his individual capacity because he was entitled to immunity on those claims.

Whether plaintiff states claims against defendant Wade in his individual capacity sufficient to withstand a Rule 12(b)(6) motion to dismiss hinges on whether defendant Wade was acting as a public official or a public employee. "It is settled in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." "An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Isenhour v. Hutto*, 350 N.C. 601, 609-10, 517 S.E.2d 121, 127 (1999) (citations omitted).

Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. "Discretionary acts are those requiring personal deliberation, decision and judgment." Ministerial duties, on the other hand, are absolute and involve "merely [the] execution of a specific duty arising from fixed and designated facts."

Id. at 610, 517 S.E.2d at 127 (internal citations omitted). In *Pigott v. Wilmington*, 50 N.C. App. 401, 404-05, 273 S.E.2d 752, 754-55 (1981), this Court determined that the chief building inspector of the City of Wilmington was a public official, not a public employee, based on the following analysis:

First, the position of chief building inspector is "created . . . by legislation" which authorizes every city in North Carolina to create a building inspection department, to appoint inspectors and to give the inspectors so appointed titles "generally descriptive of the duties assigned." G.S. 160A-411 (Supp. 1979). Second, the chief building inspector is "required to take an oath of office." Third, the chief building inspector performs "public functions del-

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egated to him as part of the sovereign power of the state”; “official trust or responsibility is imposed by law” on him; “the law prescribes and imposes the duties” he must perform; and he is “charged with fixed, public duties” and “empowered to act in the discharge of a duty or legal authority in official life.” See G.S. 160A-411 to -438; Fourth, the chief building inspector is “vested with a certain measure of discretion.” North Carolina General Statutes, Chapter 160A, part 5 contains numerous provisions which can only be interpreted as placing discretionary powers in the inspectors designated and appropriately entitled by the cities of this State.

In the instant case, Wade is not the chief building inspector, and there is no evidence from which to determine whether he was required to take an oath of office. However, when we apply the test laid out in *Isenhour*, guided by our holding in *Pigott*, we hold that as a building inspector for the County of Wayne, Wade was a public official. His position was created by statute, in that position he exercises a portion of the sovereign power delegated to him, through Wayne County, by statute, and work in his official capacity requires that he exercise discretion.

The general rule regarding official immunity is: “‘As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, . . . keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability .’” This Court has also held that, while “named defendants may be shielded from liability in their official capacities, they remain personally liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties.” To sustain the personal or individual capacity suit, the plaintiff must initially make a *prima facie* showing that the defendant-official’s tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official’s conduct is malicious, corrupt, or outside the scope of official authority.

Trantham v. Lane, 127 N.C. App. 304, 306-07, 488 S.E.2d 625, 627 (1997) (internal citations omitted. Plaintiff’s complaint does not allege that defendant Wade’s conduct was malicious or corrupt. Paragraph 28 of plaintiff’s complaint states: “Wade was performing acts for the County within the course and scope of employment at all times material to this action.” We therefore hold that plaintiff’s complaint fails to state a claim against defendant Wade in his individual

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capacity for which relief may be granted. The trial court erred in failing to dismiss the claim against defendant Wade in his individual capacity pursuant to Rule 12(b)(6), and thus we reverse the order denying defendant Wade's motion to dismiss this claim, and remand to the trial court for entry of an order granting this motion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

ANNIE P. MONTGOMERY, EMPLOYEE, PLAINTIFF V. TOASTMASTER, INC., EMPLOYER,
SELF-INSURED, (CORPORATE CLAIMS MANAGEMENT, SERVING AGENT), DEFENDANT

No. COA04-1061

(Filed 1 November 2005)

1. Workers' Compensation— findings—supporting evidence—conclusive

There was evidence to support the Industrial Commission's findings of fact in a workers' compensation case concerning the nature of the employment offered to plaintiff after her injury. Even if there was evidence to the contrary, the Commission's findings are conclusive when supported by competent evidence, and the determination of credibility is the responsibility of the Commission.

2. Workers' Compensation— make-work after injury—part-time, irregular

To prove that a disabled employee is employable, an employer must show that the tendered employment accurately reflects the employee's ability to compete with others in the job market. The Industrial Commission did not err here by concluding that plaintiff was entitled to ongoing temporary total disability where the jobs given to plaintiff were not full-time, regular positions, with similar positions available on the open market.

3. Workers' Compensation— evidence and credibility—not explained

Although a workers' compensation defendant argued that the Industrial Commission did not consider all of the evidence, the

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Commission does not have to explain its findings by distinguishing the evidence it finds credible.

Appeal by Defendant from opinion and award entered 10 June 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 May 2005.

The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan C. Anders and Meredith T. Black, for defendant-appellant.

WYNN, Judge.

In general, to prove that a disabled employee is employable, an employer must show that tendered employment accurately reflects the employee's ability to compete with others in the job market. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986). In this case, the employer contends that the employee's light-duty work was "suitable" employment. Because the record shows competent evidence supporting the Commission's findings of fact that in turn support the conclusions of law that the tendered employment positions were "make-work", we affirm the opinion and award.

Employee, Annie P. Montgomery (sixty-five years old), worked for Employer, Toastmaster, Inc., for thirty-three years in the assembly department. Her work on the assembly line for seventeen years required gripping and twisting screwdrivers repetitively with both hands; and, her work with plastic molding for fifteen years required gripping pliers with both hands to insert crystals and place other components into clocks. Ms. Montgomery estimated that she did this approximately three thousand times a day when inserting crystals and between 1,200 to 3,000 times a day when handling the other components. After a period of time, she experienced symptoms of carpal tunnel syndrome in both hands.

As stipulated to by the parties, Ms. Montgomery sustained a compensable injury by accident on 2 October 1998. On 21 January 1999, at the recommendation of her physician, Dr. Ward Oakley, Ms. Montgomery stopped working in the assembly department. Dr. Oakley performed surgery on her left wrist in January 1999 and on her right wrist in March 1999. He released her to return to work on 1 May 1999, with restrictions to avoid strenuous repetitive use of her hands until 1 June 1999.

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While Ms. Montgomery was out of work from 21 January 1999 through 3 May 1999, Toastmaster paid Ms. Montgomery temporary disability benefits. During that time, Ms. Montgomery and Toastmaster entered into a Form 21 agreement approved by the North Carolina Industrial Commission. On 5 May 1999, Toastmaster provided Ms. Montgomery with light-duty work in the subassembly department which included, *inter alia*, tearing down parts of clocks for recycling and incorporating the parts into other clocks. All the subassembly tasks required, at some point, continuous, repetitive, or consistent use of the hands. Ms. Montgomery testified that on certain business days, she did not have anything to do so she was sent home.

In June 1999, following Dr. Oakley's advice that she could resume normal activities, Ms. Montgomery returned to her previous job in the plastic molding department. However, evidence shows that Ms. Montgomery's carpal tunnel symptoms returned in less than an hour of performing her job duties in the plastic molding department. As a result, Dr. Oakley determined that she could not perform her previous molding job and placed her on permanent restriction, which meant she should avoid strenuous or repetitive use of her hands. Upon returning to work, Toastmaster again placed her in the subassembly department.

Following a two week plant inventory shutdown in July 1999, Ms. Montgomery retired at the age of sixty-two. Ms. Montgomery testified that she "wanted to continue to work because that was the only income [she] had, you know. But by [her] hands getting messed up like they did, [she] couldn't see where [she] could continue." Since July 1999, Ms. Montgomery has not sought other work.

On 21 February 2003, Deputy Commissioner Lorrie L. Dollar denied Ms. Montgomery's claim for change of condition and ordered Toastmaster to pay permanent partial disability compensation to Ms. Montgomery for fifty weeks. In an opinion and award entered 10 June 2004, the full Commission reversed Deputy Commissioner Dollar and ordered Toastmaster to pay temporary total disability beginning 21 January 1999, and continuing until further order and medical expenses. Toastmaster appealed.

On appeal, Toastmaster argues that (1) the full Commission's findings of fact regarding the nature of Ms. Montgomery's employment were not supported by competent evidence; (2) the full Commission erred in concluding that Ms. Montgomery's employment

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was not suitable employment; and (3) the full Commission failed to consider all competent evidence.

The standard of review for this Court in reviewing an appeal from the full Commission is limited to determining “whether any competent evidence supports the Commission’s findings of fact and whether the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Our review “‘goes no further than to determine whether the record contains any evidence tending to support the finding.’” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted). The full Commission’s findings of fact “are conclusive on appeal when supported by competent evidence[,]” even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only “when there is a complete lack of competent evidence to support them[.]” *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). Further, all evidence must be taken in the light most favorable to the plaintiff, and the plaintiff “is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Deese*, 352 N.C. at 115, 530 S.E.2d at 553 (citation omitted).

[1] First, Toastmaster argues that the full Commission’s findings of fact regarding the nature of Ms. Montgomery’s employment were not supported by *any* competent evidence. We disagree.

Toastmaster assigns error to the following findings of fact:

6. The first subassembly job attempted by plaintiff involved separating parts. This was not a normal job any employee did on a full-time basis. Plaintiff herself was sent home when there was not separating work to be done. The separating positions were not regular work positions available in the job market but rather were part-time jobs given to “light-duty” employees from other departments. While plaintiff was there, there were seven to eight employees in subassembly, and all were under work restrictions of some type.

11. When plaintiff returned with her increased restrictions, she was put back into the “light duty” subassembly area, where she worked until 4 July 1999 separating parts, punching dials, and

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applying labels. During this period, plaintiff had to search for things to do. This modified position plaintiff occupied was not a regular full-time position available in the competitive job market.

12. Defendant-employer was shut down from 4 July 1999 until 12 July 2002 (sic) for vacation and inventory. As of 12 July 1999, the plaintiff stopped work after 33 years working for defendant-employer. The plaintiff retired because what they had her doing “was not a job.” The plaintiff wanted to keep working, but her physical limitations and pain prevented it.

13. Plaintiff has not worked or earned any wages since her employment with defendant-employer ended. Plaintiff has not sought other work due to her physical restrictions and vocational limitations.

Our examination of the record on appeal reveals that there is competent evidence to support finding of fact six. Ms. Montgomery testified that her first subassembly job involved separating parts and that Toastmaster sent her home on 5 May 1999, because they had no work for her to do. Toastmaster also sent her home early five days in June. Ms. Montgomery further testified that “[t]here wasn’t enough of parts to separate all day[,]” and separating parts was not a permanent, full-time job at Toastmaster, but rather tasks employees performed as needed. Fannie Dockery, foreman at Toastmaster, testified that separating parts and applying labels was not a full-time job. Ms. Dockery also testified that there were seven or eight employees in subassembly, several of those with repetitive motion restrictions.

Further, the record shows competent evidence to support finding of fact eleven. Ms. Montgomery testified that when she returned to work in May 1999, with her light duty restrictions, she separated parts, punched holes out of dials, and put labels on clocks. Ms. Montgomery also testified that during this time period there were times when she had nothing to do and her supervisor would tell her “Well, I’ve got to find you something to do.” She testified that the combination of her three tasks was not a regular, full-time job. Ms. Dockery also testified that nobody performed the tasks given to Ms. Montgomery on a full-time basis.

Additionally, the record shows competent evidence to support finding of fact twelve. Dana Leviner, HR generalist for Toastmaster, testified that in July 1999 the plant closed for two weeks for inventory. Ms. Montgomery testified that she “wanted to continue to work

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because that was the only income [she] had, you know. But by [her] hands getting messed up like they did, [she] couldn't see where [she] could continue."

Moreover, the record shows competent evidence to support finding of fact thirteen. Ms. Montgomery testified that she has not worked since her employment with Toastmaster and has not sought other employment due to the limitations of her hand and limited education.

Toastmaster argues that even though Ms. Montgomery's testimony supports findings of fact six, eleven, twelve, and thirteen, her testimony is not credible and there is other evidence that contradicts Ms. Montgomery's testimony. But the full Commission's findings of fact "are conclusive on appeal when supported by competent evidence[.]" even if there is evidence to support a contrary finding. *Morrison*, 304 N.C. at 6, 282 S.E.2d at 463. Further, determining credibility of witnesses is the responsibility of the full Commission, not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. This Court does not re-weigh the evidence. *Id.* Therefore, the full Commission's findings of fact are binding on appeal.

[2] Next, Toastmaster argues that the full Commission erred in concluding that Ms. Montgomery's employment was not suitable employment and that she is entitled to ongoing disability benefits. We disagree.

The record shows, and it is not disputed by the parties, that Ms. Montgomery met her burden of proving that she is disabled, i.e., unable to earn wages due to her disability. As a result, the burden shifted to Toastmaster to show that Ms. Montgomery was employable which it sought to do by showing that Ms. Montgomery had been performing on her tendered employment. *See Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 284, 458 S.E.2d 251, 257, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 507 (1995). "However, the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). The tendered employment must accurately reflect the employee's ability to compete with others in the job market in order for the employment to be indicative of an employee's earning capacity. *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. Thus, "if other employers would not hire the employee with the employee's limitations at a comparable wage level . . . [or] if the proffered employment is so modified because of the employee's limitations that it is not ordinarily

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available in the competitive job market[.]” the job is “make work” and is not competitive. *Id.*

The full Commission concluded that the jobs given to Ms. Montgomery in May and June 1999 were not suitable jobs and Toastmaster did not meet its “burden of producing evidence that suitable jobs are available to plaintiff and that the plaintiff is capable of attaining one given the plaintiff’s age, education, physical limitations, vocational skills, and experience.” This conclusion is supported by the full Commission’s findings of fact that the jobs of separating parts and punching holes on clock dials given to Ms. Montgomery in May and June 1999, were not full-time jobs at Toastmaster; the position given to Ms. Montgomery was not a regular, full-time position offered at Toastmaster; and Toastmaster did not demonstrate that a similar job was available on the open market. These findings of fact support the full Commission’s conclusions of law that the jobs given to Ms. Montgomery were not “suitable” and Toastmaster failed to show that suitable jobs are available to Ms. Montgomery on the open market. Therefore, the full Commission did not err in concluding that Ms. Montgomery is entitled to ongoing temporary total disability compensation.

[3] Finally, Toastmaster argues that the full Commission failed to consider all competent evidence. Specifically, Toastmaster contends that the full Commission did not indicate that it gave proper consideration to the testimony of four witnesses. However, determining credibility of witnesses is the responsibility of the full Commission, not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. This Court does not re-weigh the evidence. *Id.* Furthermore, “the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible.” *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Accordingly, we must hold that this argument is without merit.

Affirmed.

Judges BRYANT and JACKSON concur.

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D.W.H. PAINTING COMPANY, INC., PLAINTIFF v. D.W. WARD CONSTRUCTION COMPANY, INC., DEFENDANT/THIRD PARTY PLAINTIFF v. DIVERSIFIED MECHANICAL LIMITED, INC., RURAL HEATING & PLUMBING, INC., BRITT PLUMBING, INC., THIRD PARTY DEFENDANTS

No. COA04-1220

(Filed 1 November 2005)

1. Construction Claims— prime contractors—services rendered for State of North Carolina—notice of damage

A de novo review revealed that the trial court did not err by denying third-party plaintiff a judgment for recovery under N.C.G.S. § 143-128 for its painting services rendered to a State of North Carolina construction project based on its determination that Article 15(e) of each party's contract with the State required notice of damage to the prime contractor allegedly responsible prior to repair of the damage, because: (1) to interpret the contract otherwise would incorporate the likelihood of protracted dispute and litigation between prime contractors; (2) plaintiff did not provide notice to defendant until several months after the damages occurred and almost two months after the repairs were completed; (3) absent timely and effective notice, no duty arose on the part of defendant to settle the claim or resolve the dispute under the contract; (4) even assuming arguendo that the designer's general statement regarding damage to plaintiff's finishes by the other three prime contractors was sufficient to establish defendant's responsibility for a portion of the damage, defendant's duty to settle plaintiff's claim or resolve the dispute never arose since defendant never received timely and effective notice; and (5) general admonitions at the weekly project meetings did not rise to the level of written or verbal notice to defendant of potential claims or notice that plaintiff was suffering economic harm from damage to its work caused by defendant.

2. Negligence— project expediter—failure to perform duties under contract with State

The trial court did not err by dismissing plaintiff's negligence claim in an action where a project expediter sued a prime contractor for its failure to properly perform the duties under its contract with the State, because: (1) evidence of negligent performance by a prime contractor of its duties under a contract with the State is legally insufficient to support a verdict based on negli-

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gence; and (2) plaintiff's only cause of action was under N.C. Gen. Stat. § 143-128.

3. Unjust Enrichment— acceptance of benefit—failure to provide notice

The trial court did not err by concluding plaintiff was not entitled to restitution based on unjust enrichment, because plaintiff failed to provide timely and effective notice to defendant of its contention that defendant caused the damage and of its intention to repaint. Therefore, defendant could not have consciously accepted the benefit of the repainting.

Appeal by defendant/third-party plaintiff from judgment entered 9 June 2004 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 11 May 2005.

Pulley, Watson, King & Lischer, P.A., by James A. Clark, for defendant-third-party plaintiff-appellant.

Harley & Bey-Christopher, P.L.L.C., by Sharon Bey-Christopher for Diversified Mechanical Limited, Inc.-third-party defendant-appellee.

CALABRIA, Judge.

D.W. Ward Construction Company, Inc., third-party plaintiff, ("plaintiff") appeals a judgment denying recovery for subcontractor D.W.H. Painting Company, Inc.'s ("D.W.H.") painting services rendered to a State of North Carolina construction project. We affirm.

Plaintiff and Diversified Mechanical Limited, Inc. ("defendant") were two of the four prime contractors for the State of North Carolina on a renovation project to Summerset Cottage at Murdock Center in Butner (the "project"). Plaintiff was the prime contractor responsible for installation of the ceilings, walls, trim, and flooring. In addition, the State designated plaintiff as the general contractor and "project expediter" which encompassed the following responsibilities: (1) scheduling of all the contractors' work; (2) maintaining a progress schedule for all contractors; (3) providing all contractors with adequate notice to ensure efficiency in all phases of the work; and (4) notifying the State's project designer (the "designer") of any changes in the project schedule. The defendant was the prime contractor responsible for all electrical work on the project. Rural Heating and Plumbing, Inc. ("Rural") was the prime contractor responsible for all

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heating, ventilation, and air conditioning work on the project, and Britt Plumbing, Inc. ("Britt") was the prime contractor responsible for the plumbing.

The project started in June 2000 and ended in either August or September 2001. During that time, the four prime contractors worked on the project simultaneously. In March 2001, plaintiff discovered damage to the walls and paint finishes and suspected the damage occurred as a result of mistakes by defendant, Rural, and Britt. Plaintiff notified the designer and was instructed to repair the damage. Since plaintiff had contracted with D.W.H. to provide painting services for the project, D.W.H. agreed to repaint all of the damaged areas on a labor and materials basis outside of their original contract. Between 30 April and 27 June 2001, D.W.H. repainted the damaged areas and billed plaintiff weekly. The final cost of D.W.H.'s work was \$15,784.11.

Plaintiff failed to notify defendant about the damage and repainting costs until August 2001. On 21 August 2001, at plaintiff's request, the designer sent letters to all three of the prime contractors: defendant, Britt, and Rural. The letters informed them of the damage to the paint finishes and asked them to pay D.W.H. for the repainting. Subsequently, plaintiff forwarded several invoices to defendant, totaling \$8,156.81, and requested defendant pay D.W.H. directly for the repainting. Plaintiff similarly invoiced and requested payment from Rural and Britt for the balance of D.W.H.'s work. Defendant, Rural, and Britt refused to pay D.W.H. for the repainting.

On 4 June 2002, since plaintiff failed to pay D.W.H., D.W.H. filed a complaint against plaintiff demanding payment for the repainting in the amount of \$13,926. plus interest from 14 February 2002. Plaintiff filed a third-party complaint against defendant, Rural, and Britt demanding payment for negligent damage to plaintiff's work or, in the alternative, restitution for the repainting costs on the basis of unjust enrichment. Plaintiff settled with D.W.H. for \$17,284.11 and agreed to settle its claim against Rural and Britt for a combined sum of \$5,000.

Plaintiff and defendant's dispute proceeded to trial, with plaintiff seeking \$12,284.11 in damages from defendant. On 9 June 2004, the trial court found plaintiff improperly notified defendant about the damage and defendant was not responsible for the damages. Based on these findings, the trial court concluded "[plaintiff] failed to prove by the greater weight of the evidence that it is entitled to any contribution or reimbursement from [D]iversified [defendant] for

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any work done by D.W.H.” and entered judgment in favor of defendant. Plaintiff appeals.

N.C. Gen. Stat. § 143-128(b) (2003) authorizes the State to enter into “separate-prime contracts” for construction projects and provides in pertinent part:

(b) Separate-prime contracts.—When the State . . . or other public body uses the separate-prime contract system, it shall accept bids for each subdivision of work for which specifications are required . . . and shall award the respective work specified separately to responsible and reliable persons, firms or corporations regularly engaged in their respective lines of work. . . . Each separate contractor shall be directly liable to the State of North Carolina . . . or other public body and to the other separate contractors for the full performance of all duties and obligations due respectively under the terms of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor.

By referring to each prime contractor’s contract with the State, N.C. Gen. Stat. § 148-128(b) “contemplates that a contractor who breaches his statutory duty to fulfill his contractual duties and obligations shall be liable for contract damages.” *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 404-05, 380 S.E.2d 796, 804 (1989). Under N.C. Gen. Stat. § 148-128(b), although the prime contractors did not enter into separate contracts with each other, “each contracted with the [State], and in that contract each affirmed its statutory duty to be liable to the other for damage to the other’s property or work.” *Bolton*, 94 N.C. App. at 397, 380 S.E.2d at 800. Accordingly, “a prime contractor may be sued by another prime contractor working on a construction project for economic loss foreseeably resulting from the first prime contractor’s failure to fully perform ‘all duties and obligations due respectively under the terms of the separate contracts.’” *Id.* (quoting N.C. Gen. Stat. § 143-128(b)).

[1] Plaintiff first asserts the trial court improperly interpreted Article 15(e) of each party’s contract with the State to require notice of damage to the prime contractor allegedly responsible prior to repair of the damage. An issue of contract interpretation is a question of law reviewed *de novo*. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

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In pertinent part, Articles 14c and 15e of each party's contract with the State provide the following:

ARTICLE 14

. . . .

c. All contractors shall be required to cooperate and consult with each other during the construction of this project. . . . Each contractor shall be responsible for any damage to other contractor's work

. . . .

ARTICLE 15

. . . .

e. Should a contractor cause damage to the work or property of another contractor, he shall be directly responsible, and upon notice, shall promptly settle the claim or otherwise resolve the dispute.

Interpreted together, Articles 14c and 15e require accountability for damages and settlement after timely and effective notice. Timely and effective notice under Article 15e is necessary to enable the contractor allegedly responsible for damage an opportunity to inspect the damage and to reach a prompt and equitable settlement or resolution with the prime contractor whose work was damaged. To interpret the contract otherwise would incorporate the likelihood of protracted dispute and litigation between prime contractors, as evidenced by the instant case, which may impact the efficient completion of the project, and conceivably encourage abuses. Therefore, the trial court properly interpreted Article 15e to require timely and effective notice to the prime contractor allegedly responsible for the damage prior to repair.

In the instant case, plaintiff did not provide notice to defendant until several months after the damages occurred and almost two months after the repairs were completed. Absent timely and effective notice, no duty arose on the part of defendant to settle the claim or resolve the dispute under the contract. Accordingly, we hold the trial court properly concluded plaintiff failed to give defendant proper notice of its alleged responsibility for damages and was barred from recovery.

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Nonetheless, plaintiff cites *Biemann & Rowell Co. v. Donohoe Cos.* for the proposition that, under Article 18a and f of each party's contract with the State, the designer "is vested with the authority to render judgment on a contractor's performance, [and] the determination is prima facie correct[.]" *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 243, 556 S.E.2d 1, 4 (2001). Plaintiff argues that under this standard, the 21 August 2001 letter from the designer to defendant, Britt, and Rural established defendant's liability by stating, "Clearly, there was damage to the finishes of the General Contractor by the other Prime Contractors" during the later phase of the project. In pertinent part, Article 18a and f provide the following:

a. The designer shall provide general administration of the performance of construction contracts, including liaison and necessary inspection of the work to ensure compliance with plans and specifications. . . . He has authority to stop work or to order work removed, or to order corrections of faulty work where such action may be necessary to assure successful completion of the work.

. . .

f. Based on the designer's inspections and evaluations of the project, the designer shall issue interpretations, directives and decisions as may be necessary to administer the project. His decisions relating to artistic effect and technical matters shall be final, provided such decisions are within the limitations of the contract.

Article 15e requires timely and effective notice to the contractor allegedly responsible for the damage prior to repair in order to establish the prime contractor's duty under the contract to settle the claim or resolve the dispute. Therefore, even assuming *arguendo* that the designer's general statement regarding damage to plaintiff's finishes by the other three prime contractors was sufficient to establish defendant's responsibility for a portion of the damage, defendant's duty to settle plaintiff's claim or resolve the dispute never arose because defendant never received timely and effective notice.

In the alternative, plaintiff argues the evidence did not support the trial court's finding of fact and conclusion of law that plaintiff failed to give defendant timely and effective notice. In a bench trial, the trial court's "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support

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them, even though the evidence might sustain findings to the contrary.” *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). This Court reviews *de novo* whether a trial court’s conclusions of law are supported by its findings of fact. *Mann Contr’rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999).

Specifically, plaintiff contends defendant received sufficient notice of its responsibility for the damage to plaintiff’s work in several weekly project meetings. With respect to State construction projects, this Court stated in *Biemann* that notice provided in weekly project meetings is sufficient only where an aggrieved contractor gives “written or verbal notice of potential claims at these meetings [or] . . . notice that it is suffering economic harm.” *Biemann*, 147 N.C. App. at 246, 556 S.E.2d at 6. Contrary to plaintiff’s argument, competent evidence indicated the weekly project meetings included discussion regarding damages directed to the prime contractors collectively and generally reminded them to work together and avoid damaging other contractors’ work. Such general admonitions at these meetings do not rise to the level of “written or verbal notice [to defendant] of potential claims [or] . . . notice that [plaintiff was] suffering economic harm” from damage to its work caused by defendant. *Id.* Accordingly, there was evidence to support the trial court’s finding of fact and its finding of fact supported its conclusion of law that plaintiff failed to provide defendant with timely and effective notice.

[2] Plaintiff next asserts the trial court erred by dismissing its negligence claim. We consider the trial court’s judgment to have adjudicated both plaintiff’s N.C. Gen. Stat. § 143-128 claim and its negligence claim on the merits. Nevertheless, we must determine whether plaintiff could properly assert a negligence claim separate from its N.C. Gen. Stat. § 143-128 claim in order to discern whether plaintiff’s arguments concerning the sufficiency of the evidence as to causation and damages must be addressed. This Court’s decision in *Bolton* is dispositive of this issue. In *Bolton*, a prime contractor sued a project expediter alleging the project expediter was negligent in causing undue delay that resulted in damages to the prime contractor and its subcontractor. *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. at 396, 380 S.E.2d at 799. In considering the validity of the prime contractor’s claim, this Court determined the trial court properly granted a directed verdict in favor of the project expediter on the negligence claim; however, the prime contractor had a claim pursuant to N.C. Gen. Stat. § 143-128 for the project expediter’s failure to fully perform

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the duties under the provisions of its contract with the State. *Bolton*, 94 N.C. App. at 397, 380 S.E.2d at 800.

Accordingly, evidence of negligent performance by a project expediter of its duties under a contract with the State is legally insufficient to support a verdict based on negligence; the evidence can only be presented to the finder of fact for a verdict on a claim under N.C. Gen. Stat. § 143-128. *See generally Wellmon v. Hickory Construction Co.*, 88 N.C. App. 76, 79, 362 S.E.2d 591, 593 (1987) (stating “[a] motion . . . for a directed verdict under [N.C. Gen. Stat. §] 1A-1, Rule 50(a) [(2003)] tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff”). We discern no legally significant difference between *Bolton*, in which a prime contractor sued a project expediter for its failure to properly perform the duties under its contract with the State, and the instant case, in which a project expediter sued a prime contractor for its failure to properly perform the duties under its contract with the State: both involve two prime contractors. Therefore, in the instant case, plaintiff’s only cause of action was under N.C. Gen. Stat. § 143-128. Having determined plaintiff’s claim under N.C. Gen. Stat. § 143-128 fails for lack of timely and effective notice to defendant, we need not address plaintiff’s arguments regarding the sufficiency of the evidence.

[3] Plaintiff finally asserts the trial court erred in concluding plaintiff was not entitled to restitution based on unjust enrichment. Unjust enrichment is “a claim in quasi contract or contract implied in law.” *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). “When one [party] confers a benefit upon another which is not required by a contract either express or implied [in fact] or a legal duty, the recipient thereof is often unjustly enriched and will be required to make restitution therefor.” *Siskron v. Temel-Peck Enterprises*, 26 N.C. App. 387, 390, 216 S.E.2d 441, 444 (1975).

In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable.

Booe, 322 N.C. at 570, 369 S.E.2d at 556. Additionally, “the defendant must have consciously accepted the benefit.” *Id.*

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In the instant case, plaintiff failed to provide timely and effective notice to defendant of its contention that defendant caused the damage and of its intention to repaint. Therefore, defendant could not have consciously accepted the benefit of the repainting. Accordingly, the trial court properly determined plaintiff was not entitled to restitution for unjust enrichment due to its failure to provide defendant with proper notice.

We have carefully considered plaintiff's remaining arguments and consider them to be without merit. For the foregoing reasons, we affirm the trial court's judgment in favor of defendant.

Affirmed.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. HAROLD LEO McVAY, III, DEFENDANT

No. COA04-1370

(Filed 1 November 2005)

1. Homicide— attempted first-degree murder—short-form indictment

A short-form indictment using language from N.C.G.S. § 15-144 properly charged defendant with attempted first-degree murder.

2. Evidence— lay opinion—defendant trying to kill officer

The trial court did not err in an attempted first-degree murder prosecution by admitting the lay opinion of various law enforcement officers that defendant “tried to kill” an officer. The testimony of the officers amounted to nothing more than shorthand statements of fact based on their knowledge and observations.

3. Criminal Law— jury request to review testimony—denial not an abuse of discretion—concern about narrow focus

The trial court reasonably exercised its discretion in an attempted murder and assault prosecution by denying the jury's request to review a deputy's testimony. The court was clearly concerned that the jury might overemphasize the testimony of the deputy and not properly consider the totality of the evidence.

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Appeal by defendant from judgments dated 20 May 2004 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 8 June 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

BRYANT, Judge.

On 8 December 2003, Harold Leo McVay, III, (defendant) was indicted on seven counts of assault with a firearm on a law enforcement officer (03 CRS 2746-2748, 2752, 2753-55); assault with a deadly weapon with intent to kill (03 CRS 2750); attempted murder (03 CRS 2751); and discharging a firearm in city limits (03 CRS 2756). Defendant was tried before a jury at the 17 May 2004 criminal session of the Jackson County Superior Court, the Honorable J. Marlene Hyatt presiding. On 20 May 2004, the jury found defendant guilty of attempted murder, assault with a deadly weapon with intent to kill, and four counts of assault with a firearm on a law enforcement officer. The jury found defendant not guilty on three counts of assault with a firearm on a law enforcement officer. The trial court dismissed the charge of discharging a firearm in city limits for insufficient evidence and arrested judgment on the charge of assault with a deadly weapon with intent to kill. Defendant appeals his convictions.

Facts

On 18 October 2003 at approximately 6:00 p.m., Officer Shannon Ashe of the Sylva Police Department responded to a call of shots fired at 69 Magnolia Street in Sylva, North Carolina. Upon arrival, Officer Ashe saw defendant standing on the porch of the house and talking to an individual standing inside the doorway. Officer Ashe ordered defendant to show his hands, whereupon defendant turned around and fired two shots at Officer Ashe with a nine-millimeter handgun. Officer Ashe was struck once in his abdomen, but was protected from the full force of the shot by his bulletproof vest. Officer Ashe retreated to cover and called for backup. Defendant fired two or three more shots at Officer Ashe and Officer Ashe returned fire. His backup having not arrived, Officer Ashe retreated down the street and lost sight of defendant.

Several officers from various law enforcement agencies responded to the scene to support Officer Ashe. After setting up a

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perimeter and conducting a search of the area, defendant was located in his house at 61 Magnolia Drive. The officers took up positions around the back of the house and Deputy Matthew Helton of the Jackson County Sheriff's Department established a dialogue with defendant through the storm door. Deputy Helton attempted to convince defendant to lay down his weapon and surrender to the officers, but defendant refused. Defendant and Deputy Helton talked off and on for at least 45 minutes. During this time defendant would speak with Deputy Helton while standing behind a closed storm door, holding his handgun in his right hand and often drinking a beer he held in his left hand. At one point during the dialogue defendant stated, "This is going to end in thirty seconds." Shortly thereafter, defendant broke out the glass of the storm door and began firing toward Deputy Helton. Defendant swept his weapon in an arc from right to left while firing a total of three to four times. The defendant's shots were heard going over the heads of Trooper Denny Wood of the North Carolina Highway Patrol, and Deputy Blake Watson of the Jackson County Sheriff's Department.

Deputy John Fox of the Jackson County Sheriff's Department returned fire with his rifle, firing two or three shots, none of which struck defendant. Deputy Helton also returned fire with his shotgun, discharging a total of three rounds, hitting defendant and causing him to fall back into his house. Officers then ran into the house, finding defendant wounded and lying on the floor. Defendant was taken into custody and then transported by ambulance to Harris Regional Hospital.

On appeal, defendant raises three issues: (I) whether defendant's conviction for attempted first degree murder must be vacated because North Carolina does not authorize a short-form indictment for attempted murder; (II) whether the trial court erred by admitting lay opinion testimony by various law enforcement officers that defendant "tried to kill" Officer Ashe; and (III) whether the trial court committed reversible error when it denied the jury's request to review the testimony of Deputy Watson. For the following reasons, we find no error.

I

[1] Defendant first argues that as North Carolina does not specifically authorize the use of a short-form indictment for the crime of attempted murder and because the indictment at issue did not suffi-

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ciently allege the offense of attempted first-degree murder, his conviction for attempted murder must be vacated. Defendant also relies on a recent decision by this Court where a conviction for attempted murder was vacated based on a faulty indictment which used short-form language for first-degree murder and charged attempted common law murder. *See State v. Jones*, 165 N.C. App. 540, 598 S.E.2d 694 (2004), *rev'd* 359 N.C. 832, 616 S.E.2d 496 (2005). Subsequent to defendant's filing of his brief, the North Carolina Supreme Court reversed this Court's holding in *Jones*, finding short-form indictments for attempted first-degree murder constitutional and statutorily authorized. *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496 (2005). See also, *State v. Andrews*, 154 N.C. App. 553, 559-60, 572 S.E.2d 798, 803 (2002); *State v. Trull*, 153 N.C. App. 630, 640, 571 S.E.2d 592, 599 (2002); and *State v. Choppy*, 141 N.C. App. 32, 41, 539 S.E.2d 44, 50-51 (2000); all finding short-form indictments sufficient to charge attempted first-degree murder.

Section 15-144 of the North Carolina General Statutes provides in an indictment for murder, "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder [victim's name]." N.C. Gen. Stat. § 15-144 (2003). Section § 15-170 further provides that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. Gen. Stat. § 15-170 (2003). The North Carolina Supreme Court has held that when N.C.G.S. § 15-144 is construed alongside N.C.G.S. § 15-170, the use of a short-form indictment to charge attempted first-degree murder is authorized. *Jones*, 359 N.C. at 838, 616 S.E.2d at 499. "[W]hen drafting such a indictment, it is sufficient for statutory purposes for the state to allege 'that the accused person feloniously, willfully, and of his malice aforethought, did [attempt to] kill and murder' the named victim." *Id.*

The indictment in the instant case charges defendant with the offense of attempted first-degree murder using the language from N.C. Gen. Stat. § 15-144, and states: "The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did OF MALICE AFORETHOUGHT ATTEMPT TO KILL AND MURDER SHANNON RICHARD ASHE." Defendant was properly charged in a short-form indictment with attempted first-degree murder. This assignment of error is overruled.

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II

[2] Defendant next argues the trial court erred by admitting lay opinion testimony of various law enforcement officers that defendant “tried to kill” Officer Ashe. Defendant contends such testimony amounted to an improper expression of opinion in violation of the rules of evidence governing lay opinion testimony.

Under the North Carolina Rules of Evidence, a lay witness may testify in the form of opinions or inferences only if the opinions or inferences are “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2003). “Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” N.C. Gen. Stat. § 8C-1, Rule 704 (2003).

[Our courts have] long held that a witness may state the ‘instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.’ Such statements are usually referred to as shorthand statements of facts.

State v. Spaulding, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *sentence vacated on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). *See also*, *State v. Marlow*, 310 N.C. 507, 523-24, 313 S.E.2d 532, 542 (1984) (testimony that an event occurred “after the murder” held to be a shorthand statement of fact); *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981) (witness’ testimony he had been “robbed” properly admitted as a shorthand statement of fact).

Here, the testimony by the officers amounted to nothing more than shorthand statements of fact based on their knowledge and observations. The statements made by the officers do not implicate the guilt or mental state or intent of defendant, but rather explain their perceptions and the impact of those perceptions on their actions. This assignment of error is overruled.

III

[3] Finally, defendant contends the trial court failed to exercise its discretion in denying the jury’s request to review the testimony of Deputy Watson. The trial court has the discretionary authority to allow the jury, upon request, to reexamine material received in evi-

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dence and to review portions of the testimony. N.C. Gen. Stat. § 15A-1233(a) (2003). When presented with a request to review the testimony of a witness “the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue.” *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). A court’s complete failure to exercise discretion amounts to reversible error. *Ashe*, 314 N.C. at 35, 331 S.E.2d at 656-57 (Where the trial court felt it could not grant the request because the transcript was not available . . . the court erred by not exercising its discretion in denying the request.); *see also*, *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980) (Where our Supreme Court found a failure to exercise discretion when the trial court responded to a request to have the transcript of a witness’ testimony read to it by stating “the transcript is not available to the jury.”). Otherwise, a court’s ruling under N.C. Gen. Stat. § 15A-1233(a) is a discretionary decision and it ordinarily will be reviewed only for an abuse of discretion. *State v. Perez*, 135 N.C. App. 543, 554, 522 S.E.2d 102, 110 (1999). An abuse of discretion occurs “where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Defendant argues the trial court’s decision not to permit the jury review of Deputy Watson’s testimony was both arbitrary and not the result of a reasoned decision-making process. However, the record clearly shows the trial court reasonably exercised its discretion in denying the jury’s request. With all of the jurors in the courtroom, the court stated:

I am sorry but I am not going to grant your request. The jury has the responsibility of recalling all the evidence. To begin rehearing parts of the evidence by means of providing you with a written transcript would tend to emphasize certain portions of the evidence without giving equal publication to the other evidence in the case.

For that reason, it would be best not to let portions of the evidence be repeated without having it all repeated because all of the evidence is important.

The trial court was clearly concerned that by allowing the jury to review the testimony of only one of the many witnesses heard at the trial the jury might overemphasize the testimony of Deputy Watson

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and not properly consider the totality of the evidence before them. Our Supreme Court has held that “[i]n instructing the jury to rely upon their individual recollections to arrive at a verdict, the trial court exercised its discretion and complied with the requirements of N.C.G.S. § 15A-1233(a).” *State v. Corbett*, 339 N.C. 313, 338, 451 S.E.2d 252, 265 (1994); *see also, State v. Harden*, 344 N.C. 542, 563, 476 S.E.2d 658, 669 (1996). The trial court properly exercised its discretion in denying the jury’s request to review Deputy Watson’s testimony and the denial was not an abuse of the trial court’s discretion. This assignment of error is overruled.

No error.

Judges McCULLOUGH and TYSON concur.

HARRY J. REAVES AND SHELIA REAVES, PLAINTIFFS V. JEROME NATHANIEL HAYES,
DEFENDANT

No. COA04-1732

(Filed 1 November 2005)

1. Contracts— construction of driveway—consent judgment—specifications—not dependent covenants

So long as defendant’s ability to use a driveway built to benefit both parties is not adversely affected, specifications regarding the location of a driveway and the types of rock comprising the driveway cannot be construed as dependent covenants (which are indispensable to the parties’ intent). The trial court did not err by allowing recovery from defendant for the cost of the driveway despite deviations from the consent order which required its construction.

2. Judgments— consent—construction of driveway—value of plaintiff’s labor

A consent order for the building of a driveway to benefit both parties did not permit plaintiff, who had worked in the business, to charge defendant for the value of his services in building the driveway. Read in context, the term “labor costs” includes only hired labor.

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Appeal by plaintiffs and defendant from judgment entered 26 April 2004 by Judge Andy Cromer in Guilford County Superior Court. Heard in the Court of Appeals 14 September 2005.

Mercedes O. Chut for plaintiff appellants-appellees.

William G. Barbour for defendant appellant-appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from a judgment in which the trial court remitted a jury verdict against defendant for costs associated with the construction of a driveway and denied plaintiffs' request for attorneys fees. Defendant appeals from the portion of the judgment fixing his liability. We conclude that the trial court misinterpreted the agreement which establishes defendant's liability such that a new trial is required.

FACTS

Plaintiffs, Harry J. Reaves (hereinafter "Reaves") and his daughter, Shelia Reaves, and defendant, Jerome Nathaniel Hayes (hereinafter "Hayes"), are the record owners of real property located on or near Miltonwood Road in Guilford County, North Carolina. Prior to 21 September 1990, the Reaveses' property had access to a public right of way, and Hayes' property did not. A consent order entered on 21 September 1990 granted Hayes a twelve-foot-wide access easement across the Reaveses' property and granted the Reaveses a twelve-foot-wide access easement along the southern boundary of Hayes' property. The consent order further provided that

6. . . . [Hayes] shall be responsible and liable for the expenses incurred in the construction of a 6 inch crush and run driveway along the access easement to the southwest corner of his property for the mutual benefit of [Hayes] and the . . . Reaves[es], including any surveying costs involved in locating the exact path of the easement.

. . . .

8. If [Hayes] fails to build the driveway as described . . . and the . . . Reaves[es] construct the driveway[,], they shall be entitled to a lien against the property of [Hayes] for the entire amount expended for the construction of this driveway, including, but not limited to, surveying costs, grading costs, materials costs and

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labor costs, and enforceable pursuant to the North Carolina Statutory Liens on Real Estate general statutes.

Reaves ultimately built the driveway himself, and thereafter, he and his daughter filed suit against Hayes for, *inter alia*, construction costs in the amount of \$25,675.

The evidence adduced at trial tended to show that, before retiring, Reaves had worked in grading and clearing land and constructing driveways, and that he had fastidiously attended to the building of the driveway in the instant case. According to Reaves, he spent approximately 700 hours clearing and grading the land, preparing the soil, building a base, and installing stone. Reaves sought \$18,850 as payment for his own labor, based on an estimate of the cost of completing the driveway submitted to Reaves by a company that specializes in grading, clearing, and grubbing land.

Though the consent judgment provided for the use of “crush and run,” Reaves instead used sandrock as a base for the driveway. The evidence showed that sandrock was less expensive than crush and run. Further, Reaves placed washed stone rather than crush and run on top of the base. Reaves testified that an applicable city code required the use of washed stone as opposed to crush and run, and washed stone was less expensive than crush and run.

The jury rendered a verdict against Hayes for \$21,500. The trial court remitted \$2,975 from this verdict and entered a judgment for \$18,525 against Hayes. The trial court denied the Reaveses’ motion for attorneys fees. Both parties now appeal.

I.

[1] The first issue for our consideration is whether the trial court erred by allowing recovery for a non-conforming driveway. Hayes argues that Reaves and his daughter are entitled to recover nothing because, *inter alia*, the location of the driveway does not correspond to the location of Hayes’ easement, and Reaves substituted sandrock and washed stone for the crush and run required by the consent order. We conclude that Reaves’ deviations from the consent order do not necessarily justify excusing Hayes from his obligations under the parties’ agreement.

“A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction. It is construed as any other con-

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tract.” *Mullen v. Sawyer*, 277 N.C. 623, 629, 178 S.E.2d 425, 428 (1971). Thus, a consent judgment “must be enforced according to contract principles.” *Helms v. Schultze*, 161 N.C. App. 404, 409, 588 S.E.2d 524, 527 (2003). Under contract law, if there are two parties to a construction contract, and one party’s performance is substantial and beneficial to the other party, yet fails to completely comply with the parties’ agreement, then the other party is not necessarily entitled to avoid the contract. *Poe & Co. v. Brevard*, 174 N.C. 762, 765, 94 S.E. 420, 421 (1917). In such cases, the outcome hinges on whether the incomplete performance constitutes a breach of a dependent covenant of the agreement:

“A covenant is dependent where it goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. A breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or courts of equity may grant rescission in such instances if the remedy at law will not be full and adequate.”

Wilson v. Wilson, 261 N.C. 40, 43, 134 S.E.2d 240, 242-43 (1964) (citations omitted).

In the instant case, paragraph six of the consent order contains Hayes’ agreement to be “responsible and liable for the expenses incurred in the construction of a 6 inch crush and run driveway along the access easement to the southwest corner of his property.” The dependent covenant upon which Hayes’ liability hinges is the installation of a useable driveway. So long as Hayes’ ability to make full use of the driveway is not adversely affected, the specifications regarding the location of the driveway and the types of rock which comprise it cannot be construed as dependent covenants.¹ Hayes has not filed a counterclaim for breach of contract by Reaves, has not sought relief from the consent order, and has not alleged that

1. We note, however, that because the consent order specifies that “crush and run” shall be used, Hayes may not be required to pay for a more costly material chosen on a whim by Reaves. See *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 887 (1960) (noting that, in a “‘construction contract[,] . . . a party is entitled to have what he contracts for or its equivalent’”) (citation omitted). Likewise, if Reaves in fact chose an improper location for the driveway, such action standing alone did not change the agreed-to location of Hayes’ easement. See *id.*

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Reaves' failure to install the driveway in the proper place and with the correct materials has entirely deprived him of what he bargained for: a useable driveway.

Therefore, the trial court was not compelled to conclude that Hayes should be relieved of his obligation to pay the amount expended to build the driveway. The corresponding assignments of error are overruled.

II.

[2] The next issue is whether the trial court misinterpreted the consent order when it permitted Reaves and his daughter to recover the value of Reaves' services in installing the driveway. Hayes argues that Reaves' labor is not recoverable under the plain and unambiguous language of the consent order. We agree.

As a consent order is merely a court-approved contract, it is "subject to the rules of contract interpretation." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). The proper interpretation of a contractual provision presents a question of law, which is reviewed *de novo* by this Court. *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004). In interpreting a contract, our courts adhere to the following principles:

"[T]he goal of construction is to arrive at the intent of the parties when the [contract] was [written]. Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect. . . . [I]f the meaning of the [contract] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein."

Gaston County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (citations omitted).

In the instant case, paragraph eight of the consent order only subjects Hayes to liability for "the entire amount expended for the construction of th[e] driveway, including, but not limited to, sur-

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veying costs, grading costs, materials costs and labor costs.” None of these terms is further defined. Thus, each word must be construed in accordance with its ordinary meaning and in light of the given context.

The word “amount,” as it is used in the consent order, is synonymous with the word “sum,” which most often means “an indefinite or specified amount of money.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 72, 2289 (1968). The verb “expend,” which is expressed in the past tense as “expended,” means “to pay out or distribute” and is synonymous with the word “spend.” *Id.* at 799. Consequently, in the provision at issue, the plain and unambiguous meaning of the phrase “amount expended” is “money paid out.” Further, the consent judgment is structured such that “labor costs” are a subset of the “amount expended.” Therefore, read in context, the term “labor costs” includes only hired labor.

Accordingly, the consent order does not permit Reaves to charge Hayes for the value of his services, and the trial court erred by construing the consent order to the contrary. Thus, Hayes is entitled to a new trial.

III.

Our resolution of the issue discussed in section II, *supra*, makes it unnecessary to address the parties’ remaining arguments on appeal. We note, however, that this opinion should not be taken as suggesting that the method by which Reaves sought to prove the value of his services was sufficient to prove this item of alleged damages with reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (“As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty.”), *reh’g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 462, 553 S.E.2d 431, 440 (2001) (noting that the claiming party must present relevant data providing a basis for a reasonable estimate), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002). Furthermore, this opinion should not be read as condoning the trial court’s decision to remit the jury’s verdict without the Reaveses’ consent. *Gardner v. Harriss*, 122 N.C. App. 697, 699, 471 S.E.2d 447, 449 (1996) (“It is well established that the trial courts in this State have no authority to grant remittitur without the consent of the prevailing party.”).

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The trial court's judgment is vacated, and this case is remanded for a

New trial.

Judges McGEE and JACKSON concur.

STATE OF NORTH CAROLINA ON BEHALF OF TERESA GILLIKIN, PLAINTIFF V.
DENNIS MCGUIRE, DEFENDANT

No. COA04-1213

(Filed 1 November 2005)

1. Child Support, Custody, and Visitation— deviation from Child Support Guidelines—failure to make findings

The trial court erred by deviating from the presumptive child support guideline amount and setting \$56 per month for ongoing child support payments, because (1) the trial court failed to make any finding regarding the reasonable needs of the child for support; and (2) this failure mandates a remand for further findings of fact.

2. Child Support, Custody, and Visitation— prospective child support—findings of fact and conclusions of law required

The trial court erred when it failed to order prospective child support from January 2002 (the month after the complaint was filed) through March 2004 (the month the court's order was entered), and the case is remanded to the lower court for further findings of fact and conclusions of law consistent with this opinion, because: (1) the court must make findings regarding the reasonable needs of the child for an award of prospective child support; and (2) if the trial court decides not to order prospective child support, it must show that it properly deviated from the Guidelines and include appropriate findings of fact to justify the deviation.

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3. Child Support, Custody, and Visitation— reimbursement for past paid public assistance—trial court's ability to consider equitable factors

The trial court did not err in a child support case by failing to order defendant to reimburse the State of North Carolina for past paid public assistance given to the minor child in light of the trial court's ability to consider equitable factors in determining whether to order reimbursement where the trial court found that at the time plaintiff mother was receiving this assistance, other persons had been named as potential fathers of the minor child, and plaintiff mother waited over fifteen years before instituting this action against defendant.

Appeal by plaintiff from an order filed 28 April 2004, *nunc pro tunc* 24 February 2004 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 10 May 2005.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State, on behalf of plaintiff Teresa Gillikin.

Wheatly, Wheatly, Nobles, Weeks, Valentine & Lupton, P.A., by Stephen M. Valentine, for defendant Dennis McGuire.

BRYANT, Judge.

The State of North Carolina, on behalf of Teresa Gillikin (plaintiff), appeals an order filed 28 April 2004, *nunc pro tunc* 24 February 2004. We reverse and remand to the trial court for further findings of fact and conclusions of law consistent with this opinion.

Facts

On 10 December 2001, a summons and complaint was filed by the State of North Carolina Child Support Enforcement Agency in Carteret County on behalf of plaintiff. Plaintiff is the mother of the minor child in this action. The complaint alleged that defendant was the biological father of the minor child and requested an adjudication of paternity. The complaint also requested child support, medical insurance coverage, and reimbursement to the State of North Carolina for its contribution to the support of this child in the form of past paid public assistance. Defendant timely answered the complaint and filed accompanying motions to dismiss.

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This matter came for hearing at the 24 February 2004 civil session of Carteret County District Court with the Honorable Jerry F. Waddell presiding. By the date of trial the parties had obtained DNA genetic testing. The results showed the probability that defendant was the biological father of the minor child was 99.99 percent.

Both parties testified at the hearing. Plaintiff informed the court she was not working because she was disabled and received \$680.00 per month in disability income. In addition, the minor child in this action received a payment of \$139.00 per month due to plaintiff's disability and was on Medicaid for health insurance coverage. Defendant testified he also was not working because he was disabled. He informed the court he received approximately \$1,038.00 per month in social security disability, and approximately \$2,200.00 per month in veteran's disability pay.

Amy Oden, the Carteret County child support agent who manages this case, was the last to testify at this hearing. Oden informed the court the State was requesting child support beginning from the date of the filing of the complaint, and \$4,694.00 in repayment of past paid public assistance which the State of North Carolina paid as a grant to plaintiff to assist her in supporting her minor child.

The trial court ruled it would not order repayment of past paid public assistance because during the time plaintiff was receiving these benefits other people had been named as potential fathers of the minor child. The trial court also found, that while prospective child support back to the date of the filing of the complaint is owed, the amount could not be determined because both plaintiff and defendant were receiving disability income. However, the trial court held that ongoing child support beginning on 1 March 2004 was appropriate and set the payment at the minimum amount of \$56.00 per month. In addition, the trial court found defendant did not have to provide medical insurance coverage for the minor child but was required to cooperate with plaintiff in applying for social security benefits for the child. The State appealed on behalf of plaintiff.

On appeal, plaintiff raises the issues of whether the trial erred: (I) in its award of ongoing child support because it improperly deviated from the presumptive guidelines; (II) in its denial of prospective child support; and (III) in its denial of reimbursement to the State for past paid public assistance.

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I

[1] Plaintiff first argues the trial court erred when it set ongoing child support payments at \$56.00 per month because the trial court did not properly deviate from the presumptive child support guideline amount. Section 50-13.4(c) of the North Carolina General Statutes provides:

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

N.C. Gen. Stat. § 50-13.4(c) (2003).

“Child support is to be set in such amount ‘as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties.’” *Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000) (quoting N.C. Gen. Stat. § 50-13.4(c)). “Child support set consistent with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support.” *Id.*

A court may deviate from the guidelines established pursuant to Chapter 50 in two situations: (1) when application of the guidelines does not meet or exceed the reasonable needs of the child; or (2) when application would be unjust or inappropriate. N.C.G.S. § 50-13.4(c) (2003). “If the trial court determines that the application of the guidelines would be inequitable or otherwise deviates from the guidelines, ‘the court must hear evidence and find facts related to the reasonable needs of the child for support and the parents ability to pay.’” *Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782

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(2001) (quoting *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000)).

In the instant case, the trial court failed to make any finding regarding the reasonable needs of the child for support. This Court has previously held failure of the lower court to make findings regarding the reasonable needs of the child for support mandates remand for further findings of fact. See *Hendricks*, 143 N.C. App. at 549, 545 S.E.2d at 782; *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998). Accordingly, we remand to the lower court for further findings of fact and conclusions of law consistent with this opinion. Whether the taking of additional evidence is necessary, we leave this matter in the lower court's discretion.

II

[2] Plaintiff next argues the trial court erred when it failed to order prospective child support from January 2002, the next month after the Complaint was filed, up through March 2004, the month the court's order was entered. In its Paternity and Child Support Order, the trial court found while prospective child support back to the date of the filing of the complaint is owed, an amount could not be determined because both plaintiff-mother and defendant are receiving disability income.

Prospective child support is normally determined under the North Carolina Child Support Guidelines. See *Taylor v. Taylor*, 118 N.C. App. 356, 362, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996). As in Issue I, *supra*, for an award of prospective child support the court must make findings regarding the reasonable needs of the child for that support. *Id.* If the trial court decides not to order prospective child support, it must show that it properly deviated from the Guidelines and include appropriate findings of fact to justify the deviation. *Lukinoff*, 131 N.C. App. at 647, 507 S.E.2d at 595. Accordingly, we remand to the lower court for further findings of fact and conclusions of law consistent with this opinion.

III

[3] Lastly, plaintiff argues the trial court erred by failing to order defendant to reimburse the State of North Carolina for past paid public assistance given to the minor child. "Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the

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responsible parent or parents of the child.” N.C. Gen. Stat. § 110-135 (2003). In determining whether to grant reimbursement under N.C.G.S. § 110-135, the trial court is vested with “considerable discretion to consider both law and equity” *Moore County ex rel. Evans v. Brown*, 142 N.C. App. 692, 695, 543 S.E.2d 529, 531 (2001).

When ruling on issues of child support, the “trial court may consider the conduct of the parties, the equities of the given case, and any other relevant facts.” *Maney v. Maney*, 126 N.C. App. 429, 431, 485 S.E.2d 351, 352 (1997). “Trial court orders regarding the obligation to pay child support are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.” *Moore County ex rel. Evans*, 142 N.C. App. at 694-95, 543 S.E.2d at 531 (citations and internal quotations omitted). “Where trial is by judge and not by jury, the trial court’s findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.” *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991).

In the instant case, the trial court held:

The court will not order the Defendant to reimburse the State of North Carolina any amount that had been paid out due to the fact that during the time that Plaintiff was receiving said benefits other people had been named as potential fathers of this minor child. The Court does not feel that it was fair to have this Defendant pay back said monies due to negligence on plaintiff’s behalf.

At the hearing the trial court expressed its concern over the fact that Teresa Gillikin had named multiple persons as the minor child’s father and waited over fifteen years before instituting this lawsuit against defendant. The trial court went on to hold:

the time when a lot of this past public assistance was accrued, was the same period of time when [Gillikin] had named somebody else [as the minor child’s father]. Now, I’m supposed to say, “Oh, well, I’m just going to discount all of that and make [defendant] pay?” That’s just not fair and I’m not going to do it.

In light of the trial court’s ability to consider equitable factors in determining whether to order reimbursement, and in light of the highly deferential standard under which we must review its order,

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we hold this evidence sufficient to show that the trial court's denial of plaintiff's request was not wholly unsupported by reason, or otherwise a manifest abuse of discretion. This assignment of error is overruled.

Affirmed in part, reversed and remanded in part.

Judges WYNN and JACKSON concur.

STATE OF NORTH CAROLINA v. JIMMY MONICK HALL

No. COA05-129

(Filed 1 November 2005)

1. Sentencing—habitual offender—not cruel and unusual

The trial court's use of seven prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act was consistent with N.C.G.S. § 15A-1340.14 and with legislative purpose and was not cruel and unusual punishment.

2. Constitutional Law—effective assistance of counsel—failure to object to record level

Defendant did not demonstrate ineffective assistance of counsel where his trial counsel did not object to his assigned prior record level, but defendant did not show that not objecting was unreasonable or that there was any probability of a different result without the alleged error.

Appeal by defendant from judgment entered 16 September 2004 by Judge Clarence E. Horton, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 12 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange, for the State.

Bruce T. Cunningham, Jr., for defendant-appellant.

TYSON, Judge.

Jimmy Monick Hall ("defendant") appeals judgment entered after a jury found him to be guilty of obtaining property by false

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pretenses and attempting to obtain property by false pretenses. We find no error.

I. Background

On 16 September 2004, a jury found defendant guilty of removing two DVD collections from the shelf of a retail store and receiving store credit for the DVDs in the amount of \$510.38. Defendant was also convicted of attempting to obtain store credit at BJ's Warehouse Club for a seventeen inch and an eighteen inch monitor. Following the jury's verdicts, defendant pled guilty to being an habitual felon and the trial court sentenced him to 121 to 155 months imprisonment. Defendant appeals.

II. Issues

Defendant asserts: (1) the trial court erred in imposing a Class C Level V sentence instead of a Class C Level III sentence; and (2) if an objection in the trial court was required to preserve this error, the failure of trial counsel to object to his sentence at prior record level V constitutes ineffective assistance of counsel.

III. Cruel and Unusual Punishment

[1] Defendant argues the State's use of prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act constitutes cruel and unusual punishment. We disagree.

The United States Supreme Court stated:

The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

Rummel v. Estelle, 445 U.S. 263, 284, 63 L. Ed. 2d 382, 397 (1980). The Supreme Court also stated, "[o]utside the context of capital punishment successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 273, 382 L. Ed. 2d at 390.

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N.C. Gen. Stat. § 14-7.1 (2003) provides, “[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon.”

Defendant pled guilty and does not contest on appeal having attained the status of an habitual felon. His uncontested prior record shows seven prior felony and eleven prior misdemeanor convictions. Upon his conviction of an habitual felon, defendant was classified as a Class C felon and received a sentence of between 121 to 155 months pursuant to the North Carolina Structured Sentencing Act. N.C. Gen. Stat. § 14-7.6 (2003).

N.C. Gen. Stat. § 14-7.6 states:

When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced as a Class C felon.

Defendant argues the use of his prior misdemeanor convictions in enhanced sentencing due to being an habitual felon resulted in cruel and unusual punishment under the Eighth Amendment to the United States Constitution. U.S. Const. amend. VIII. In addition to the United States Supreme Court opinion in *Rummel*, our Supreme Court has stated, “our legislature has acted with constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment.” *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985), *cert. denied*, — N.C. —, 547 S.E.2d 39 (2001). The Court stated, “[l]egislation which is designed to identify habitual criminals and which authorizes enhanced punishment has withstood eighth amendment challenges.” *Id.* at 119, 326 S.E.2d at 254.

One purpose of N.C. Gen. Stat. § 15A-1340.14 is to deter and segregate career criminals from continuing to commit crimes. Another purpose is to remove recidivist criminals from preying on the public through progressively longer incarceration with each criminal conviction. The trial court’s use of defendant’s eleven prior misdemeanors and seven prior felonies to enhance his sentencing is consistent with the legislative intent and purpose “to identify habitual criminals and to authorize enhanced punishment.” *Id.* at 118, 326 S.E.2d at 253. A sentence consistent with the statute does not consti-

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tute cruel and unusual punishment under the Eighth Amendment. The assignment of error is overruled.

IV. Ineffective Assistance of Counsel

[2] Defendant argues the failure of trial counsel to object to a sentence at a prior record level V constituted ineffective assistance of counsel. We disagree.

The United States Supreme Court provided a two-prong test for a defendant to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The test requires:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

Defendant failed to show either requirement of this test. Defendant's only argument was that counsel failed to object to the trial court's sentence imposed upon defendant, after he pled guilty to being an habitual felon. Defendant does not dispute the validity of any of his prior convictions. The record contains a knowing and voluntary transcript of plea.

The Supreme Court stated, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 80 L. Ed. 2d at 694. Defendant failed to argue or show his trial counsel's failure to object to a permissible sentence was unreasonable. Defendant also failed to identify any probability that a different result would have occurred absent the alleged error of trial counsel. *Id.* This assignment of error is overruled.

V. Conclusion

The trial court did not err in imposing a Class C Level V sentence instead of a Class C Level III sentence in violation of defendant's Eighth Amendment rights. Defendant has failed to show he received

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ineffective assistance of counsel or that a different result at trial would have occurred but for his counsel's alleged error. Defendant received a fair trial free from errors he assigned and argued. We find no error in defendant's trial or sentence.

No error.

Judges JACKSON and JOHN concur.

BRENDA UHRIG, PLAINTIFF V. DOUGLAS L. MADARAS, DEFENDANT

No. COA04-1667

(Filed 1 November 2005)

Child Support, Custody, and Visitation— support—foreign order—full faith and credit

The trial court did not err by finding that the 1991 Tennessee child support order was controlling in this case instead of a 1989 Washington state child support order, that defendant had paid all child support due under the Tennessee order, and that defendant owed no outstanding arrearages, because: (1) 28 U.S.C. § 1738B(e)(2) provides that a child support order may be modified by a sister state if the rendering state has lost continued, exclusive jurisdiction over the child support order if neither the child nor any of the parties continue to reside in the state or if each of the parties consented to the assumption of jurisdiction by another state; (2) although in 1986 the Washington trial court entered the original child support order, in 1988 Tennessee became the state with continuing exclusive jurisdiction over the parties since defendant and both children resided in Tennessee and both parties entered into an Agreed Order whereby they consented to Tennessee's jurisdiction over the child support order; (3) although, plaintiff moved back to Washington with the two children in 1988, defendant never again resided in Washington nor did he consent to Washington assuming jurisdiction, and thus, any action by Washington in 1989 was invalid and not entitled to full faith and credit as Washington had no authority to act; and (4) plaintiff never attempted to have the 1991 Tennessee child support order modified after defendant left Tennessee and moved to North Carolina.

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Appeal by plaintiff from judgment entered 23 September 2004 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 10 October 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for plaintiff-appellant.

Pitts, Hay & Hugenschmidt, P.A., by James J. Hugenschmidt, for defendant-appellee.

STEELMAN, Judge.

Plaintiff, Brenda Uhrig, appeals the trial court's order dismissing her attempted registration of a 1989 Washington state child support order. For the reasons discussed herein, we affirm.

Plaintiff and defendant, Douglas Madaras, were married and had two children. In 1986, plaintiff and defendant were granted an absolute divorce in Washington. Defendant was awarded custody and plaintiff was ordered to pay \$25.00 per month in child support. Shortly after receiving custody, defendant and the minor children moved to Tennessee and plaintiff moved to California. By the end of 1986 neither plaintiff, defendant, nor the children were living in Washington.

In October 1987, while living in California, plaintiff filed a petition in Tennessee seeking custody of the children and child support. After filing this petition, plaintiff moved to North Carolina. On 27 June 1988, the parties entered into an Agreed Order in Tennessee. Plaintiff was granted custody of the children and defendant was ordered to pay \$50.00 per month in child support. At the time the 1988 Agreed Order was entered, defendant and the children had been living in Tennessee for more than six months.

In 1989, plaintiff and the children moved back to Washington. Plaintiff filed a motion in the original divorce action in Washington seeking to modify the terms of the Agreed Order entered in Tennessee. Defendant was served with a copy of the motion, but did not respond or appear. On 26 October 1989, the Washington court issued an order increasing defendant's child support obligation to \$872.00 per month.

In 1990, plaintiff filed a petition in Tennessee to enforce the 1989 Washington order. On 14 September 1990, a Tennessee court determined defendant was in arrears under the 1989 Washington order in the amount of \$9,141.00. Tennessee entered another order on 26

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November 1990 finding arrearages in the amount of \$10,082.96. On 17 April 1991, upon its own motion, the Tennessee court set aside its orders of 6 September 1990 and 8 November 1990. In that order, the Tennessee court found defendant was not in arrears and ordered him to pay \$44.00 per week in child support. This was the last order entered in this case. No appeal was taken from this order by either party and it became a final order. Sometime after the 1991 Tennessee order was entered, defendant moved to North Carolina.

Defendant continued to pay child support payments as directed by the 1991 Tennessee order. On 22 October 2003, plaintiff filed a Notice of Registration of Foreign Support Order in Buncombe County District Court, seeking enforcement of the 1989 Washington order. In response to the Notice of Registration, defendant asserted the 1991 Tennessee order superceded the 1989 Washington order and he had made all payments required by the 1991 Tennessee order. In addition, defendant asserted a number of affirmative defenses.

The matter came on for hearing in the Buncombe County District Court. On 23 September 2004, the trial court found that the 1989 Washington order was not the controlling order, and therefore, was not entitled to enforcement. The trial court ruled the 1991 Tennessee order was controlling, that defendant had paid all support due under that order, and dismissed plaintiff's action. Plaintiff appeals.

Plaintiff contends the trial court erred in ruling that the 1991 Tennessee order superceded the 1989 Washington order, and as a result, defendant did not owe any arrearages for child support. We disagree.

We first address whether this matter is governed by the Uniform Reciprocal Enforcement of Support Act (URESA) or the Uniform Interstate Family Support Act (UIFSA). Plaintiff contends that URESA applies because the support orders were entered prior to the enactment of UIFSA on 1 January 1996, and that both the 1989 Washington order and the 1991 Tennessee order are valid and enforceable. *See Twaddell v. Anderson*, 136 N.C. App. 56, 62, 523 S.E.2d 710, 715 (1999) (noting that under URESA, a subsequent order does not necessarily nullify a prior order). We disagree.

UIFSA governs the proceedings concerning the enforceability of any foreign support order that is registered in North Carolina after 1 January 1996. *Welsher v. Rager*, 127 N.C. App. 521, 527, 491 S.E.2d 661, 664 (1997) (holding UIFSA applied to a 1985 New York support

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order registered in North Carolina in 1996). A support order becomes registered in North Carolina upon its filing. *Id.* at 525, 491 S.E.2d at 663 (citing N.C. Gen. Stat. § 52C-6-603). Plaintiff registered the 1989 Washington support order in North Carolina in 2001, well after the effective date of UIFSA. Therefore, UIFSA applies. Where UIFSA applies, there can only be one controlling support order at any given time. *Id.*

Next, we must determine which order was controlling, the 1989 Washington order or the 1991 Tennessee Order. The federal Full Faith and Credit Child Support Order Act (FFCCSOA), as amended in 1996, created a framework for dealing with multiple foreign support orders to determine which order controls, as well as provide that order with full faith and credit. *See* 28 U.S.C. § 1738B (2005); *Twaddell*, 136 N.C. App. at 64, 523 S.E.2d at 716. The FFCCSOA is binding on all states and supersedes any inconsistent provisions of state law. *Kelly v. Otte*, 123 N.C. App. 585, 598, 474 S.E.2d 131, 134 (1996). The FFCCSOA is virtually identical to UIFSA, both in terms of structure and intent. *Welsher*, 127 N.C. App. at 528, 491 S.E.2d at 665. A child support order may be modified by a sister state only if the rendering state has lost continued, exclusive jurisdiction over the child support order. 28 U.S.C. § 1738B(e). Such jurisdiction is lost in two situations: (1) if neither the child nor any of the parties continue to reside in the state; or (2) if each of the parties consented to the assumption of jurisdiction by another state. 28 U.S.C. § 1738B(e)(2).

Both of these situations are present in this case. In 1986, the Washington trial court entered the original child support order requiring plaintiff to pay defendant \$25.00 per month. By 1988, neither party nor the children were living in Washington. As a result, Washington lost jurisdiction over the matter. In 1988, Tennessee became the state with continuing, exclusive jurisdiction over the parties: defendant and both children resided in Tennessee, and both parties entered into an Agreed Order, whereby they consented to Tennessee's jurisdiction over the child support order. Although, plaintiff moved back to Washington with the two children in 1988, defendant never again resided in Washington, nor did he consent to Washington assuming jurisdiction. Accordingly, any action by Washington in 1989 was invalid and not entitled to full faith and credit as Washington had no authority to act. Further, plaintiff never attempted to have the 1991 Tennessee child support order modified after defendant left Tennessee and moved to North Carolina. Therefore, the last valid and enforceable order was the 1991 Tennessee order.

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The trial court did not err in finding that the 1991 Tennessee child support order was controlling in this case, that defendant had paid all child support due under that order, and that defendant owed no outstanding arrearages. For the reasons discussed herein, we affirm the trial court.

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER concur.

DARYL J. BLACK, PLAINTIFF V. SHELLY L. BLACK (NOW HEWETT), DEFENDANT

No. COA05-44

(Filed 1 November 2005)

Child Custody, Support, and Visitation; Civil Procedure— Rule 60(b)(6)—motion to amend effect of order—motion for relief from order

The trial court erred by granting a motion to amend the parties' child custody order pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6), and the original custody order of 28 November 2001 remains in effect, because: (1) Rule 60(b)(6) allows a trial court to grant relief from a judgment or order for any other reason justifying relief from the operation of the judgment; (2) rather than seeking to be relieved of the effect of the 28 November 2001 custody order, plaintiff sought to amend the effect of that order to reduce defendant's weeknight visitation privilege; and (3) by the terms of the trial court's Order Allowing Amendment to Custody Order, the trial court amended the decretal portion of the 28 November 2001 order, rather than relieving the plaintiff of its provisions.

Appeal by defendant from order entered 15 September 2004 by Judge J. H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 17 October 2005.

No brief filed for plaintiff-appellee.

Virginia R. Hager for defendant-appellant.

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MARTIN, Chief Judge.

On 28 November 2001 the trial court entered a written custody order granting plaintiff primary custody, and defendant visitation, of the couple's then two-year-old child. The order also established a visitation schedule, including, *inter alia*, the provision at issue in this appeal:

Weekday Visitation: Plaintiff shall transport the minor child to Defendant's house at 6:00 p.m. each Wednesday and Defendant shall exercise visitation that night and return the child to day care on Thursday morning.

On 23 August 2004, defendant filed a motion to show cause, alleging, among other things, that plaintiff violated the existing custody order by denying defendant her Wednesday night visitation on 18 August 2004, and notifying her of his intent "to stop the Wednesday overnight visits because the child had begun Kindergarten." In response to defendant's motion, plaintiff filed a "Motion To Amend Order" seeking to amend the 28 November 2001 order to comply with the trial court's oral decree made at the 5 November hearing. At the conclusion of that hearing, the trial court stated, "I'm going to follow the same visitation schedule as is set out in the temporary custody order, with a couple of exceptions. I'm going to add one overnight during the week until the child starts kindergarten" The trial court then instructed plaintiff's counsel to "draw it and show it to" defendant's counsel. However, the written custody order, as prepared by plaintiff's counsel, contained no language concerning cessation of the weeknight overnights when the child began kindergarten.

Plaintiff's motion was heard 10 September 2004. The trial court allowed the motion, citing N.C. Gen. Stat. § 1A-1, Rule 60(b)(6), and amended the order to provide that defendant would be allowed visitation on Wednesday nights from 5:30 p.m. to 8:00 p.m., rather than overnight. Defendant appeals.

Defendant argues the trial court erred by granting the motion to amend the custody order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2003). We agree.

Plaintiff's "Motion To Amend [the 28 November 2001] Order" did not specify the rule of Civil Procedure under which he sought relief. *See Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 262, 362 S.E.2d 870, 872 (1987) (while failure to give rule number pursuant to which motion is made is not fatal, to do so would

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be of great benefit to both trial and appellate courts). Thus, we must first determine whether the relief sought by plaintiff was available under any rule.

N.C. Gen. Stat. § 1A-1, Rule 59(e) (2003) permits the amendment of final judgments or orders upon motion filed within 10 days after entry of the judgment or order sought to be amended. Since plaintiff's motion was not filed for nearly three years after entry of the 28 November 2001 order, relief was not available under Rule 59.

N.C. Gen. Stat. § 1A-1, Rule 60(a) provides for the correction of clerical errors by the trial court at any time. However, the trial court has no authority, under the guise of correction of a clerical error, to make modifications to an order or judgment which affect the substantive rights of any party. *Spencer v. Spencer*, 156 N.C. App. 1, 11, 575 S.E.2d 780, 786 (2003); *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993) (amending written order to add findings announced in open court was more than correction of a clerical error, because it affected the parties' substantive rights).

Thus, although plaintiff's motion was captioned as one to "amend" the 28 November 2001 order, the motion to amend was not timely under Rule 59, and there was no clerical error to be corrected under Rule 60(a). Therefore, the trial court treated it as a motion for relief from that order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). In so doing, the trial court misconstrued Rule 60(b)(6), which allows a trial court to grant relief from a judgment or order for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6).

Here, rather than seeking to be *relieved* of the effect of the 28 November 2001 custody order, plaintiff sought to *amend* the effect of that order to reduce defendant's weeknight visitation privilege. By the terms of the trial court's "Order Allowing Amendment to Custody Order," the trial court "amended" the decretal portion of the 28 November 2001 order, rather than relieving the plaintiff of its provisions. *See White v. White*, 152 N.C. App. 588, 592, 568 S.E.2d 283, 285 (2002), *aff'd*, 357 N.C. 153, 579 S.E.2d 248 (2003) (affirming trial court's denial of a Rule 60(b) motion which did not seek relief, but expressly requested "a modification or an amendment" of the prior order). The trial court erred in considering the motion as one for relief made under Rule 60(b)(6) and in granting it. *Coleman v. Arnette*, 48 N.C. App. 733, 735, 269 S.E.2d 755, 756 (1980). The

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“Order Allowing Amendment to Custody Order” is vacated and the original custody order of 28 November 2001 remains in effect. In view of our holding, we need not address defendant’s remaining arguments.

Vacated.

Judges HUNTER and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 NOVEMBER 2005

AL-ASHMALI v. ALI No. 05-181	Lenoir (04CVD593)	Affirmed
AMMONS v. YATES No. 04-1714	Cumberland (03CVS7172)	Reversed
BARBER v. BURKE No. 05-24	Pender (03CVS240)	Reversed
HARRELL v. HEATON No. 05-40	Watauga (03CVS728)	Dismissed
IN RE B.A.T. No. 05-186	McDowell (04J22)	Affirmed in part; dismissed in part
IN RE B.S.J. No. 05-487	Halifax (02J67)	Affirmed
IN RE K.J.H. No. 05-132	Wayne (03J51)	Affirmed
IN RE K.N.O. & A.R.O. No. 04-1702	Catawba (03J33) (03J34)	Affirmed
IN RE L.T.M., K.R.M., C.R.M. No. 04-1729	Cabarus (02J136) (02J137) (02J138)	Affirmed
IN RE M.C. No. 05-152	Lenoir (04J36)	Affirmed
IN RE M.S. No. 04-1705	Wilkes (00J33)	Affirmed
KINTZ v. AMERLINK, LTD. No. 05-164	Nash (02CVS2041)	Affirmed
MLA ENTERS., LLC v. N.C. DEP'T OF MOTOR VEHICLES No. 04-1649	Mecklenburg (03CVS20639)	Affirmed
SCOTT v. FAIRBANKS CAPITAL CORP. No. 05-372	Cabarrus (04CVS309)	Appeal dismissed
STATE v. APPLE No. 04-1568	Orange (03CRS51981) (03CRS51982) (03CRS51983) (03CRS51984)	Remanded for resentencing

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STATE v. BRYANT No. 04-1668	Mecklenburg (03CRS224979) (03CRS224951)	No error
STATE v. BULLARD No. 05-25	Wilkes (01CRS54213) (02CRS50422) (02CRS50444)	Affirmed
STATE v. FRACHEUR No. 04-791	Guilford (03CRS24657) (03CRS94977)	Remanded for resentencing
STATE v. FREEMAN No. 04-1617	Lenoir (03CRS54752) (04CRS311)	No error
STATE v. GODWIN No. 05-297	Wayne (03CRS59688)	No error
STATE v. HEINTZ No. 05-252	Cumberland (02CRS57998) (02CRS57999) (02CRS58000) (02CRS58001)	Remanded for resentencing
STATE v. JONES No. 05-154	Wake (04CRS17767) (04CRS17768)	No error
STATE v. MIDDLEBROOKS No. 04-1662	Cleveland (01CRS8796) (01CRS56766)	No error
STATE v. MOORE No. 04-1482	Wake (01CRS81075) (01CRS81841)	No error
STATE v. RUMPH No. 05-281	Gaston (04CRS288) (04CRS12391) (03CRS67185) (03CRS68925) (03CRS67187) (03CRS67188) (03CRS67189) (03CRS67190)	No error
STATE v. SANFORD No. 05-41	Cleveland (00CRS8143)	No error
STATE v. WHEELER No. 05-225	Pitt (04CRS11216)	No error

TRAN v. NGUYEN No. 05-62	Guilford (03CVS5480)	Affirmed
WARD v. WACHOVIA BANK, NA No. 05-246	Forsyth (04CVS3825)	Affirmed
WENDT v. THOMAS No. 04-1651	Carteret (03CVS1370)	Dismissed

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SUSAN SINCLAIR McALLISTER ROBERTS, PLAINTIFF-APPELLANT V.
MICHAEL W. McALLISTER, DEFENDANT-APPELLEE

No. COA04-1045

(Filed 15 November 2005)

1. Child Support, Custody, and Visitation— deviation from child support guidelines—imputing minimum income

The trial court did not abuse its discretion by deviating from the North Carolina Child Support Guidelines based on the reasonable needs of the children and by imputing minimum income to plaintiff mother who is voluntarily unemployed, because plaintiff's support for the children has been negligible including that: (1) although plaintiff had the financial ability, she did not establish any residence in Charlotte where the children lived and only exercised visitation when she had the children flown to Maryland even though the 3 September 2002 custody order provided that the parties could share the placement of the children equally if plaintiff established a part-time residence in Charlotte; and (2) although plaintiff testified the children's school schedule enabled her to spend 135 overnights with the children, she did not meet the goal of shared physical custody as she had only seen the children in Maryland an average of one weekend per month over the previous year. The trial court made specific findings of fact as to the parties' ability to pay as well as the reasonable needs of the parties' three children.

2. Child Support, Custody, and Visitation— support amount— failure to make sufficient findings of fact

The trial court erred by entering an order requiring plaintiff mother to pay child support for the parties' three children in the amount of \$800 per month and by awarding defendant husband \$800 per month in child support for the thirteen months between the date of entry of the child custody order and the date of the support hearing, because: (1) N.C.G.S. § 50-13.4(c) provides that if the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify the basis for the amount ordered; and (2) while the trial court's findings were sufficient to support deviation, the findings were insufficient to indicate the basis for the award of support in the amount of \$800 as required by N.C.G.S. § 50-13.4.

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3. Child Support, Custody, and Visitation— uninsured medical expenses—failure to show abuse of discretion

The trial court did not err by requiring plaintiff mother to pay one-half of the uninsured medical expenses for the minor children, because: (1) it is in the trial court's discretion to determine a fair sharing arrangement for uninsured medical expenses; (2) in deviation cases where assets, estates, and incomes are taken into consideration, it is proper for the trial court to use methods other than a comparative income analysis; and (3) plaintiff failed to show an abuse of discretion.

4. Child Support, Custody, and Visitation— attorney fees— reimbursement

The trial court did not abuse its discretion in a child support case by ordering plaintiff mother to reimburse defendant father for half of his attorney fees, because: (1) N.C.G.S. § 50-13.6 grants the trial court discretion to award reasonable attorney fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit; (2) the trial court made specific findings as to defendant's inadequate monthly income, that his attorney fees were reasonable, and that such fees were increased as a result of plaintiff's failure to contribute a reasonable sum to the support of the children after being asked to do so; and (3) the trial court concluded defendant did not have sufficient assets to pay his attorney fees and plaintiff has the means to pay half.

Judge JACKSON concurring in part and dissenting in part.

Appeal by plaintiff from an order dated 23 December 2003 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 19 April 2005.

Wyrick, Robbins, Yates & Ponton, L.L.P., by K. Edward Greene, and Heidi C. Bloom, for plaintiff-appellant.

Ingrid K. Friesen, P.A., by Ingrid K. Friesen, for defendant-appellee.

BRYANT, Judge.

Susan Sinclair McAllister Roberts (plaintiff) appeals from an order dated 23 December 2003 awarding Michael W. McAllister (defendant) child support in the amount of \$800.00 per month for

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their three children, half of the uninsured medical expenses for their children and attorneys' fees in the amount of \$2,500.00.

Plaintiff and defendant were married on 7 February 1987 and separated on 7 July 1999 when defendant left the marital home. Plaintiff and defendant are the parents of three minor children: a son born 25 May 1993; a daughter born 29 January 1995; and another daughter born 4 October 1997. Plaintiff has a bachelor's degree in journalism from the University of North Carolina and for the first five years of the parties' marriage, she worked in various public relations positions. The maximum income plaintiff earned was \$25,000.00 in 1993, which was the last year plaintiff worked during the marriage. By mutual agreement of the parties, plaintiff did not work outside the home following the birth of their first child in 1993. During the marriage, plaintiff was a homemaker, the children's primary caregiver, and their home-school teacher. For the duration of the marriage, plaintiff, defendant and the three minor children lived solely on defendant's income, which at the time of the parties' separation was \$39,000.00. Following their separation, plaintiff and defendant agreed plaintiff would not return to work until the youngest child started kindergarten in August 2003.

Defendant remarried in March 2001 and lives in Charlotte. Together, defendant and his wife have a daughter who was born 21 May 2000. Defendant's wife has primary custody of her two children from her first marriage. Following the entry of the McAllister custody order in September 2002, defendant, his wife and their six children all live primarily together. Defendant is employed at York Technical College, earning approximately \$40,000.00 per year. Defendant's gross income per month is \$3,351.33 and his net income is \$2,575.00 per month. Defendant maintains health insurance for his wife and their six children at a cost of \$254.00 per month.

In December 2000, plaintiff remarried a physician, Scott Roberts and moved to Rockville, Maryland. After a few years, they returned to Asheville, North Carolina, where Dr. Roberts earned approximately \$300,000.00 per year. In June 2003, plaintiff and Dr. Roberts had a son. Plaintiff intends to stay home and provide full time care for their son, until he is at least school age. Plaintiff's estate consists of a savings account of \$3,500.00 and a checking account with approximately \$30,000.00, both of which are joint accounts with Dr. Roberts. Plaintiff and Dr. Roberts also have a joint account containing \$50,000.00 in proceeds from the sale of their Maryland house. Dr. Roberts also receives \$300.00 per month from the sale of the home he

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owned prior to his marriage to plaintiff. Plaintiff has no income, and aside from the joint accounts, she has a one-fifth interest of undetermined value in her deceased mother's home.

On 20 August 1999 plaintiff filed a complaint against defendant seeking child custody, child support, postseparation support, alimony, equitable distribution and attorneys' fees. Defendant filed an answer and counterclaim on 7 October 1999, asserting his own claims for child custody, child support and equitable distribution. On 13 July 2000 plaintiff and defendant entered into a consent judgment resolving the issues of equitable distribution, child custody, child support arrearages, prospective child support, postseparation support, and alimony. Pursuant to the 13 July 2000 order: plaintiff was awarded, *inter alia*, primary custody of the parties' three children; \$18,800.00 from defendant for the payment of back child support and lump sum alimony; a portion of the proceeds from the sale of their home; and defendant was ordered to pay plaintiff \$875.00 per month in child support.

On 11 April 2002 defendant filed a motion to modify the custody order of 13 July 2000. Plaintiff filed her own motion to modify child custody on 8 May 2002. On 3 September 2002, the trial court entered an order modifying the July 2000 order by awarding the parties joint legal and physical custody. The 3 September 2002 order suspended defendant's obligation to pay child support.

On 9 October 2002 plaintiff filed a motion in the cause requesting a modification of the 3 September 2002 order to clarify the circumstances of her parenting time; specifically, whether the children could visit her in Maryland. On 16 October 2002, defendant filed a response as well as a motion for child support. On 30 July 2003 defendant filed a notice of intent to deviate from guidelines and on 18 September 2003 counsel for defendant filed an affidavit of attorneys' fees. On 23 December 2003, the trial court entered an order requiring plaintiff to pay defendant \$800.00 per month as prospective child support. The trial court further ordered plaintiff to pay defendant \$10,400.00 for child support arrearages accruing from September 2002 through the date of the support hearing and attorneys' fees in the amount of \$2,500.00. Plaintiff appeals.

The issues on appeal are whether the trial court: (I) abused its discretion in deviating from the N.C. Child Support Guidelines; (II) erred by entering an order requiring plaintiff to pay child support;

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(III) erred by awarding defendant \$800.00 per month in child support for the thirteen months between the date of entry of the custody order and the date of the support hearing; (IV) erred in requiring plaintiff to pay one-half of the uninsured medical expenses for the minor children; and (V) abused its discretion in ordering plaintiff to reimburse defendant for his attorneys' fees.

I

[1] The first issue plaintiff raises on appeal is whether the trial court abused its discretion in deviating from the N.C. Child Support Guidelines (Guidelines). Plaintiff argues the trial court erred in imputing minimum income to plaintiff and then concluding application of the Guidelines would not meet the reasonable needs of the children.

Under N.C. Gen. Stat. § 50-13.4(c), a court “shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section.” N.C.G.S. § 50-13.4(c) (2003). Child support set in accordance with the Guidelines “is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support.” *Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000). The trial court may, however, deviate from the Guidelines if:

after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the [children] considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate

N.C.G.S. § 50-13.4(c) (2003). In deviating from the Guidelines, the trial court must follow a four-step process:

First, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the [children] for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the [children] considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow

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effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the [children]; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the [children] or would be otherwise unjust or inappropriate.

Spicer v. Spicer, 168 N.C. App. 283, 292, 607 S.E.2d 678, 685 (2005) (citation omitted). Our Supreme Court has explained that “an order for child support must be based upon the interplay of the trial court’s conclusions of law as to (1) the amount of support necessary to ‘meet the reasonable needs of the child’ and (2) the relative ability of the parties to provide that amount.” *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). These conclusions must in turn be based on factual findings “specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents.” *Id.* (internal quotation marks omitted). In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Under this standard of review, the trial court’s ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *Id.* The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. *Id.* at 441-42, 567 S.E.2d at 837.

In the case *sub judice*, the trial court made very extensive findings of fact. The trial court found, in pertinent part, the following:

4. The [defendant] father earns \$3,351.33 per month from his employment at York Technological College in South Carolina. His net pay is \$2,575.28 per month.
5. The defendant father’s household consists of the defendant; his wife[]; their daughter[]; [the new wife’s two] children[] and the three [McAllister children]. [Defendant’s new wife] works part time and earns \$333.00 per month.
6. The defendant[] provides health insurance for the . . . six children and [his new] wife. This will increase to \$254.00 per

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month effective December 1, 2003. The defendant father has obtained some dental insurance coverage effective September 2003 at a cost of \$50.00 per month that will cover all eight family members. . . . The children's health insurance expenses now total \$127.61.

. . .

8. Defendant's household expenses are as follows: The mortgage payment is \$1,100.00 per month, the car payment is \$132.00 per month; transportation expenses are \$54.00 per month; utilities total \$482.00 per month; food and school lunches are \$1,866.00 per month; the total household expenses (housing, utilities, vehicle and food) shared by the eight family members are \$3,634.00 per month. These expenses do not include any expenses related to specific individuals, but are the expenses for all of the persons in the household. These expenses are substantial, but in light of the fact the household consists of six children and two adults, they do not appear to be unreasonable or inflated. The only reasonable way to determine the children's expenses for shelter, food and transportation, is to divide those total household expenses by the number of household members. Three-eighths [sic] of that expense is \$1,362.75 per month.

. . .

10. The reasonable needs of the three [McAllister] children, . . . for health, education, and maintenance, **total \$2087.36**, as follows: \$597.00 are for specific child related expenses[,] \$1,362.75 represent the children's share of the total household expenses. \$127.61 is the monthly health insurance expense for the children.

. . .

15. [P]laintiff . . . has had previous high risk pregnancies, and miscarriages . . . and prevented her from having the ability to work. Her infant[] is three months old as of the date of the hearing. [Plaintiff's] husband, Scott Roberts, is a physician who earned \$300,000 per year and recently relocated to Asheville, North Carolina[.] Scott Roberts pays all of the living expenses for [plaintiff] and [their son] and does not request or expect any contribution from [plaintiff] for household expenses. [They agree] that Scott Roberts will provide

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financial support and work outside the home and [plaintiff] will stay at home and provide full time care of [their son].

16. [Plaintiff] has assets as part of her financial estate, that include:

(A) A marital interest in joint accounts with Scott Roberts totaling \$33,500.00. This account may include amounts deposited by [p]laintiff during her marriage to Scott Roberts, including:

1. \$75,000.00-\$80,000.00 lump sum payment received after the sale of the marital home owned with defendant . . . [which] represented a 55% share of the marital estate in equitable distribution settlement, a lump sum alimony payment and child support arrears. The marital property was divided by consent agreement. . . .

2. Proceeds from the sale of 1987 Honda after her marriage to Scott. The plaintiff does not know the sale price of the Honda.

3. \$20,000.00 cash inherited from her mother and deposited during the summer of 2003.

(B) A marital interest in Closing proceeds totaling \$50,000.00 Cash from the July 2003 sale of . . . the [Maryland] marital home of Scott and [plaintiff] that was . . . sold in July 2003 for \$490,000.00. **The cash is in a joint account with her husband.**

(C) 1/5 interest in [plaintiff's] mother's home in Concord [which is for sale]. The plaintiff does not know the fair market value of her mother's home.

(D) A marital interest in \$300.00 per month income from sale of real property in Haw Creek.

(E) Plaintiff currently has no debt.

. . .

19. [P]laintiff is voluntarily unemployed. [Plaintiff and defendant] had agreed . . . plaintiff would not work outside the home after their first child was born. [Plaintiff and] Dr. Roberts, have agreed [she] would not work outside the home after their marriage. The plaintiff has no intentions to obtain em-

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ployment and had no intention to obtain employment after the entry of the September 2003 custody order prior to becoming pregnant in the fall of 2002.

...

23. Since there is no “recent work history”, the [c]ourt can not impute potential income based on [plaintiff’s] 1993 employment at Concord Hospital earning \$25,000.00 per year. The evidence suggests an employee with [] plaintiff’s educational background could obtain employment in the Charlotte area earning \$35,000.00 per year but there is no evidence concerning prevailing job opportunities and earning levels in Maryland (August 2003) or in Buncombe County (September 2003). The guidelines provide “If the parent has no recent work history or vocational training, potential income should not be less than minimum hourly wage for a 40 hour week.” The Court has calculated the support using minimum wage, but has no reasonable basis sum in excess of minimum wage. To use any other sum would be arbitrary.

...

25. The child support guidelines are inequitable and inadequate to meet the reasonable needs of [the McAllister children] for several reasons: First, it is unjust to the [sic] give the plaintiff a deduction of \$765.00 from her income for the support of her [and Scott’s] son. Scott’s extremely high income of \$25,000.00 per month establishes a very high support amount regardless of the plaintiff’s income being minimum wage or even \$35,000.00 per year. The \$765.00 for a three month old baby exceeds the guideline amount of support of \$266.00 for [the McAllister children], three school aged children with significantly higher financial needs for their support. In addition, Scott and the plaintiff have a marital agreement that the plaintiff will not be asked or expected to contribute to any of the financial support for [their son] or the marital household. Scott provides 100% of [their son’s] and the plaintiff’s financial support and is more than able to do so. Secondly, the actual needs of the [McAllister] children, . . . greatly exceed the guideline amount. In addition, the defendant is unable to bear the financial responsibility for these children without contribution from the plaintiff. The plaintiff’s attitude that the defendant needs to live within his means without incur-

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ring credit card and other debt is naive and unrealistic. The plaintiff has a significant cash estate of her own monies, and her marital interest in joint assets, that she could use to pay a reasonable portion of the care of the children.

(Emphasis in original). Based on these findings, the trial court made the following conclusions:

5. The plaintiff has the ability to contribute \$800.00 per month to the support of the [McAllister] children and that sum constitutes a deviation from the child support guidelines.
6. Application of the guidelines would not meet the reasonable needs of the [McAllister] children, considering the relative ability of each parent to provide support and would be otherwise unjust or inappropriate.

The determination of whether to impute income to a parent who is voluntarily unemployed is a determination based in part on the conduct of the parent. *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516, (2002). In *Wolf* the Court cited these factors to be considered when determining whether a parent had disregarded marital and parental obligations:

- (1) failing to exercise [her] reasonable capacity to earn,
- (2) deliberately avoiding [her] family's financial responsibilities,
- (3) acting in deliberate disregard for [her] support obligations,
- (4) refusing to seek or to accept gainful employment,
- (5) willfully refusing to secure or take a job,
- (6) deliberately not applying [herself] to [her] business,
- (7) intentionally depressing [her] income to an artificial low, or
- (8) intentionally leaving [her] employment to go into another business.

Wolf at 527, 566 S.E.2d at 518-19 (citing *Bowes v. Bowes*, 287 N.C. 163, 171-72, 214 S.E.2d 40, 45 (1975)). In order to base an award on earning capacity "the finder of fact must have before it sufficient evidence of the proscribed intent. Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *Bowes* at 173-74, 214 S.E.2d at 46. Further, a determination

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of bad faith in conjunction with suppression of income is best made on a case-by-case basis. *Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 415 (2003).

In the case *sub judice*, the trial court found that “[plaintiff] also failed to seek or obtain employment There is no evidence that she was withholding support to hurt or punish her children but she clearly has a naive indifference to their need for financial support from her.” This “naive indifference” prompted the trial court to conclude that plaintiff’s indifference to the children’s need for support was intentional and willful avoidance and showed a deliberate disregard of her responsibility to support her children. Because plaintiff had not been employed for eleven years, the trial court imputed income to her as allowed by the Child Support Guidelines in the amount of minimum wage. *See Mittendorff v. Mittendorff*, 133 N.C. App. 343, 515 S.E.2d 464 (1999) (holding the burden was on the non-custodial mother to prove that she had acted in good faith in taking a lower paying job in seeking a reduction of child support based on her reduction in income).

Plaintiff argues that minimum wage income should not be imputed to her because she was unemployed due to several miscarriages and a high-risk pregnancy. The trial court, however, found plaintiff has consistently testified that she had no intention of working, and that her subsequent pregnancies were initiated after the 3 September 2002 child custody order required plaintiff “to establish a part time residence in Charlotte” where defendant lived. Plaintiff cites *Pataky*, in support of the proposition that she should not be deemed to be acting in bad faith merely because she was unemployed by choice. However, *Pataky* is distinguishable. In that case, after the parties entered into a shared physical custody agreement, defendant gave notice of his intention to quit his computer programming job earning \$65,000 annually to pursue a graduate degree in school counseling. *Pataky* at 291, 585 S.E.2d at 406. Further, defendant had developed a plan to meet his financial obligations to his children while he attended school. *Id.* In *Pataky*, the Court recognized that where a defendant becomes unemployed by choice in order to become a fulltime student, there may not be bad faith if he continues to provide adequate support for his children. The *Pataky* Court found that the defendant continued to provide for the support of his children during the period he had fifty percent physical custody of his children and abided by his agreement with the child’s mother. *Id.* at 308, 585 S.E.2d at 416.

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In the instant case, plaintiff's support for the children has been negligible. The 3 September 2002 custody order provided that plaintiff and defendant could share the placement of the children equally if the plaintiff established a part time residence in Charlotte. The trial court found that although plaintiff had the financial ability she "did not establish any residence in Charlotte and only exercised visitation when she [had] the children flown to Maryland." Although plaintiff testified the children's school schedule enabled her to spend 135 overnights with the children, the evidence showed she did not meet the goal of shared physical custody, as she had only seen the children in Maryland an average of one weekend per month over the previous year. In calculating a guideline amount of child support, the court calculated a deduction for her newborn son and still determined "the guidelines are inequitable and inadequate to meet the needs of the [McAllister] children." The trial court made specific findings of fact as to the parties' ability (and inability) to pay as well as the reasonable needs of the three McAllister children. The trial court followed the *Spicer* four-step test and made the necessary findings of fact to support deviation from the Guidelines. This assignment of error is overruled.

II & III

[2] Plaintiff also argues the trial court erred by entering an order requiring plaintiff to pay child support for her and defendant's three children in the amount of \$800 per month. Further, plaintiff contends the trial court in effect compounded the error by awarding defendant \$800.00 per month in child support for the thirteen months between the date of entry of the custody order and the date of the support hearing.

N.C.G.S. § 50-13.4(c) states "[i]f the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify . . . the basis for the amount ordered." However, the trial court's findings of fact fail to state its basis for the determination of the **amount** ordered as required by the Statute. Here, the trial court found the reasonable needs of the children to be \$2,087.36 per month. In deviating from the Guidelines, the trial court imputed minimum wage income to plaintiff based on a forty-hour work week. Further, the trial court factored in plaintiff's ability to pay based on the contributions of plaintiff's husband who earned over \$20,000.00 per month. While the trial court's findings were sufficient to support deviation, the findings were not sufficient to indicate the basis for the

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award of support in the amount of \$800.00 as required by N.C.G.S. § 50-13.4. Accordingly, we reverse and remand for further findings of fact to support the basis of the amount of the child support award.

IV

[3] Plaintiff next argues the trial court erred in requiring plaintiff to pay one-half of the uninsured medical expenses for the minor children.

It is in the discretion of the trial court to determine a fair sharing arrangement for the uninsured medical expenses. *Lawrence v. Nantz*, 115 N.C. App. 478, 482, 445 S.E.2d 87, 90 (1994) (apportionment of medical expenses between parents factored in their respective incomes, assets and expenses, to order defendant to pay pro rata share of monthly payments). In deviation cases, where assets and estates and incomes are all taken into consideration, it is perfectly proper for the court to use methods other than a comparative income analysis. *Id.*

In August 2002, the trial court ordered plaintiff and defendant to split equally the children's medical expenses when custody was modified. The trial court, in its discretion, did not change this formula at the hearing in 2003. Plaintiff has failed to show an abuse of discretion. This assignment of error is overruled.

V

[4] Plaintiff's final argument on appeal is that the trial court abused its discretion in ordering plaintiff to reimburse defendant for his attorneys' fees.

Pursuant to N.C. Gen. Stat. § 50-13.6, the trial court has the discretion to award reasonable attorneys' fees "to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C.G.S. § 50-13.6 (2003). "An award of attorneys' fees will be stricken only if the award constitutes an abuse of discretion." *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980).

Specifically, plaintiff challenges finding of fact number twenty-six, alleging it is not supported by competent evidence:

The defendant has incurred \$5,035.32 in legal fees in connection with the motion for child support. These legal fees are reasonable. The costs were increased due to the plaintiff's failure to contribute a reasonable sum to the support of the children after

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being asked to do so. The defendant is not financially able to pay for all of his legal expense at this time.

Here the trial court made specific findings as to defendant's inadequate monthly income, that his attorneys' fees were reasonable and that such fees were increased as the result of plaintiff's "failure to contribute [] a reasonable sum to the support of the children after being asked to do so." In addition, the trial court concluded defendant did not have sufficient assets to pay his attorneys' fees and plaintiff had the means to pay half. Further, defendant's attorney submitted an affidavit to the trial court in September 2003 and indicated her representation of defendant, the extent of her representation, the nature and amount of her legal work and her skill level and hourly wage. The trial court found the \$5,035.32 attorneys' fees to be reasonable. These findings are supported by competent evidence in the record. Accordingly, the trial court did not abuse its discretion in ordering plaintiff to pay one-half of defendant's attorneys' fees. This assignment of error is overruled.

Affirmed in part, reversed and remanded in part.

Judge WYNN concurs.

Judge JACKSON concurs in part, dissents in part.

JACKSON, Judge, concurring in part and dissenting in part.

I concur with the majority in its holdings affirming the payment of half of the children's uninsured medical expenses and the payment of defendant's attorneys' fees. However, I respectfully dissent from the portion of the majority opinion holding that the trial court properly deviated from the North Carolina Child Support Guidelines.

The majority correctly states that the trial court must follow a four-step process in order to deviate from the North Carolina Child Support Guidelines. While I agree with the majority that the trial court adequately followed the first three of these steps, I disagree that it sufficiently followed the final step to allow this Court to conduct an effective review of its decision. This final step requires the trial court to make "written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the [children]; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not

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meet the reasonable needs of the [children] or would be otherwise unjust or inappropriate.” *Spicer v. Spicer*, 168 N.C. App. 283, 292, 607 S.E.2d 678, 685 (2005) (citation omitted). Failure to make findings of fact, which are adequate to allow sufficient appellate review, regarding this issue requires that the case be remanded to the trial court for further findings of fact. *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993).

The trial court’s finding of fact pertaining to the presumptive child support amount was sufficient, as it demonstrated that plaintiff’s support obligation pursuant to the guidelines would be \$50.00—the minimum support obligation provided for by the guidelines, regardless of whether income was imputed to her or not. However, I would hold that the trial court’s findings of fact as to the remaining considerations were insufficient.

In its findings of fact relative to the reasonable needs of the children, the trial court made the following finding of fact:

Defendant’s household expenses are as follows: The mortgage payment is \$1,100.00 per month, the car payment is \$132.00 per month; transportation expenses are \$54.00 per month; utilities total \$482.00 per month; food and school lunches are \$1,866.00 per month; the total household expenses (housing, utilities, vehicle and food) shared by the eight family members are \$3,634.00 per month. These expenses do not include any expenses related to specific individuals, but are the expenses for all of the persons in the household. These expenses are substantial, but in light of the fact the household consists of six children and two adults, they do not appear to be unreasonable or inflated. The only reasonable way to determine the children’s expenses for shelter, food and transportation, is to divide those total household expenses by the number of household members. Three-eighths of that expense is \$1,362.75 per month.

Because defendant’s new wife, new child and two step-children also lived in the house, use of this division of expenses is impermissible as it potentially imposes a support obligation on plaintiff for members of the household other than plaintiff’s children. *Evans v. Craddock*, 61 N.C. App. 438, 441, 300 S.E.2d 908, 911 (1983). The use of this impermissible allocation results in the trial court’s findings of fact regarding the reasonable needs of the children being inadequate to allow this Court to review the trial court’s ultimate determination.

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Accordingly, I would remand this case for further findings of fact regarding the reasonable needs of the McAllister children.

In addition, I would hold that the trial court's findings of fact regarding plaintiff's ability to provide support are insufficient. In its findings regarding plaintiff's estate, earnings and condition, the trial court emphasizes the substantial income of plaintiff's current husband even though he has no support obligation to the McAllister children—the children in question here. *Duffey v. Duffey*, 113 N.C. App. 382, 384, 438 S.E.2d 445, 447 (1994). The North Carolina Child Support Guidelines specifically exclude the income of a parent's new spouse from the calculation of that parent's income for support purposes. AOC-A-162, Rev. 10/02 p. 3. Nonetheless, it was proper for the trial court to note that plaintiff's new husband provided for all of her expenses as that fact bears directly upon her condition. When the new spouse provides for all expenses, the support obligation may be calculated without deducting expenses from the supporting parent's income. *Hamilton v. Hamilton*, 57 N.C. App. 182, 184, 290 S.E.2d 780, 781 (1982). Further, "the contributions of a third party may be used to support deviation from the child support guidelines." *Guilford County by & Through Child Support Enforcement Agency v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996).

In its findings regarding plaintiff's estate, the trial court found that plaintiff had marital interests in: joint accounts with her new husband with balances totaling \$33,500.00; another account consisting of proceeds from the sale of the Robert's marital home in Maryland valued at \$50,000.00; and \$300.00 per month in rental income. The trial court went on to find that the joint accounts *may* have included amounts deposited by plaintiff representing a \$75,000.00-80,000.00 lump sum payment received by plaintiff as an equitable distribution settlement, a lump sum alimony payment, and child support arrears, all from defendant. The trial court made no specific findings as to how much of the lump sum payment was attributable to the alimony or child support arrears. The trial court further found that the account balances also might have reflected deposits from the proceeds of the sale of plaintiff's car—for which no value was found—and a \$20,000.00 cash inheritance plaintiff received from her mother's estate. No findings of fact were made that account for the extreme disparity between the amounts possibly contributed to the accounts by plaintiff (at least \$95,000.00-100,000.00) and the current balance or balances of \$35,000.00. Also included in plaintiff's estate by the trial court was a one-fifth interest in her mother's home

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of indeterminate value. Given this lack of specificity, I would hold that it is impossible for this Court to make a sufficient determination of the value of plaintiff's estate and its corresponding effect on her ability to pay support for her children from these findings.

With regard to plaintiff's ability to pay support, I would hold that the trial court erred in imputing income to plaintiff. The North Carolina Child Support Guidelines require that a parent's voluntary unemployment or underemployment be the result of the "parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation" AOC-A-162, Rev. 10/02 p. 3.

The trial court made findings of fact relating to plaintiff's lack of recent employment history and the fact that her unemployment had been, and continues to be, the result of her decision not to work until her children reach school age. The trial court further found that plaintiff had no intention of obtaining employment, consistent with her decision to stay home with her children considering the fact that she had a three-month-old child at the time of the hearing. This decision reflects a personal choice made jointly with each spouse during the course of their respective marriages.

Based upon these findings of fact, the trial court concluded that: (1) plaintiff's unemployment was voluntary; (2) plaintiff had disregarded her obligation to support her three children with defendant; (3) plaintiff's actions were intentional and willful avoidance and deliberate disregard of her support obligation to her children with defendant. The only conclusion referenced above that is supported by competent evidence is that plaintiff's unemployment was voluntary. There was no evidence in the record to support the conclusion that plaintiff willfully and intentionally avoided or deliberately disregarded her support obligation. Plaintiff simply adopted the same parenting arrangement with her new spouse that she had with defendant. *See Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003) ("[t]he dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations.") (quoting *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002)). Significantly, this parenting arrangement is substantially the same as the arrangement defendant has with his current spouse who works part-time and earns only \$333.00 per month.

Further, nowhere in the trial court's findings of fact or conclusions of law is there any suggestion that plaintiff's unemployment was a result of a "bad faith or deliberate suppression of income to

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avoid or minimize [] her child support obligation” as required for the imputation of income under the North Carolina Child Support Guidelines. Consequently, I would hold that the imputation of income to plaintiff was erroneous as it is not supported by the evidence.

Accordingly, I would hold that the trial court failed to make findings sufficient to allow adequate review of the decision to deviate from the statutory child support guidelines. I would remand this action to the trial court for further findings of fact regarding the reasonable needs of the children and plaintiff’s estate and reverse the trial court’s decision to impute income to plaintiff.

WILLIE MAYFIELD, EMPLOYEE, PLAINTIFF v. PARKER HANNIFIN, EMPLOYER, SELF-INSURED, FRANK CATES SERVICING COMPANY, SERVICING AGENT, DEFENDANT

No. COA04-1646

(Filed 15 November 2005)

1. Workers’ Compensation— contact with plaintiff’s doctor— limited

A workers’ compensation defendant is limited to obtaining information from a plaintiff’s physician by one of the methods recognized in the rules or as provided by statutes. In this case, defendant improperly sent plaintiff’s doctor a facsimile to obtain evidence for use in a hearing without plaintiff’s consent, and the doctor’s opinions rendered after that date were properly excluded.

2. Workers’ Compensation— testimony from treating physician—tainted by contact with defendant—excluded

The Industrial Commission did not err in a workers’ compensation proceeding by excluding opinions from plaintiff’s treating physician after an ex parte contact from defendant. The advocate’s language of the facsimile from defendant was designed to affect the answer and the Commission could reasonably find that the opinion was tainted after the fax.

3. Constitutional Law— equal protection—restricting defense counsel’s contact with treating physician

There was no equal protection violation in a workers’ compensation case in barring particular ex parte communications

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between defense counsel and treating physicians. Defense counsel and plaintiff's counsel are not similarly situated due to differing confidentiality obligations.

4. Workers' Compensation— conflicting medical opinions— weight of evidence—conclusions inconsistent with findings and award

The Industrial Commission was entitled in a workers' compensation case to give greater weight to one of several conflicting medical opinions concerning plaintiff's back injury, and the evidence was sufficient to support the Commission's finding that the plaintiff's leg condition was causally related to his compensable back injury. However, the Commission's conclusions were inconsistent with the findings and the ultimate award (apparently due to clerical error in modifying the Deputy Commissioner's award) and the case was remanded.

5. Workers' Compensation— improper contact with doctor— shifting treatment

When a doctor's views have been affected by an improper communication from a defendant, the Industrial Commission is entitled to shift the treatment of plaintiff to another physician.

Appeal by defendant from Opinion and Award filed 28 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 August 2005.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Matthew D. Glidewell and M. Duane Jones, for defendant-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens, J. Matthew Little, Season D. Atkinson, and William A. Bulfer, for amicus curiae North Carolina Association of Defense Attorneys.

GEER, Judge.

Defendant Parker Hannifin appeals from the Industrial Commission's opinion and award granting total disability benefits to plaintiff Willie Mayfield. Defendant argues on appeal that the Full Commission improperly excluded certain evidence from one of plaintiff's treating

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physicians after defendant, without plaintiff's consent, sent the physician a facsimile that was copied to plaintiff's counsel. Because we hold that the facsimile violated the principles set out in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990) and *Salaam v. N.C. Dep't of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), *disc. review improvidently allowed*, 345 N.C. 494, 480 S.E.2d 51 (1997), we affirm the Full Commission's exclusion of that evidence. We further hold that, although the Commission's decision is supported by competent evidence, we must remand for further proceedings because of an inconsistency between the findings of fact and conclusions of law.

Facts and Procedural History

Beginning in 1998, plaintiff worked for defendant as a hose fabricator, a position requiring him to cut and assemble hydraulic hoses. On 11 January 2001, while lifting a hydraulic hose onto a table, plaintiff felt a snapping in his lower back and began experiencing pain in that area. A few days later, he developed numbness in his left leg and left foot. On 19 February 2001, defendant filed a Form 19 that described the incident as involving a lower back injury. On the same date, plaintiff ceased working, and defendant began paying plaintiff temporary total disability benefits.

To address plaintiff's symptoms, defendant referred him to Dr. Chris Guest, a general practitioner. Dr. Guest diagnosed plaintiff with central canal stenosis with a resultant nerve root encroachment. When conservative treatment failed, Dr. Guest referred plaintiff to Dr. Randy O. Kritzer, a neurosurgeon. At plaintiff's first appointment with Dr. Kritzer, on 13 March 2001, plaintiff reported that his back pain had resolved, but that he was continuing to experience numbness in his left leg. Dr. Kritzer diagnosed plaintiff with chronic degenerative spine conditions coupled with spondylosis. Plaintiff received two epidural shots, but then declined further conservative treatment. Because Dr. Kritzer did not believe surgery would be effective, he released plaintiff from his care on 8 May 2001.

Following a recommendation from his rehabilitation nurse, plaintiff requested that Dr. Donald Hertweck, of Triad Internal Medicine Associates, P.A., be designated as his primary treating physician. Defendant agreed, and plaintiff went to his first appointment with Dr. Hertweck on 28 June 2001. He reported continuing pain, heaviness, and numbness in his left foot, although he had no back pain. Dr. Hertweck examined plaintiff and noted that his "symptoms do not correlate with the history of a back injury. . . . At this time, I cannot

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correlate his sensation of heaviness and weakness to obvious medical reason. It may still be related to his back.”

On 9 July 2001, plaintiff was referred to Dr. Albert K. Bartko III of the Southeastern Orthopaedic Specialist Sports Medicine Center. Dr. Bartko is board certified in physical medicine and rehabilitation. At plaintiff’s initial examination with Dr. Bartko, plaintiff reported resolution of his lower back pain, but described pain on the front of his left thigh, knee, and calf. At the time of plaintiff’s initial visit, Dr. Bartko indicated in his medical note that it was unusual for plaintiff’s leg and foot pain to persist when his lower back pain had resolved. He expressed concern to plaintiff that the leg pain might have a different cause, such as a mini-stroke or diabetes. Dr. Bartko limited plaintiff to sedentary or light duty, with no lifting of more than 15 pounds occasionally and no repetitive bending, twisting, or squatting.

During plaintiff’s next three follow-up visits with Dr. Bartko in July and August, plaintiff’s leg symptoms showed little to no improvement. On 25 September 2001, plaintiff was terminated from work due to his unavailability for six consecutive months. At that time, plaintiff remained on work restrictions and had not commenced any light duty or rehabilitative employment.

On 26 September 2001, plaintiff reported to Dr. Bartko that his back pain had returned three weeks earlier. Dr. Bartko noted that plaintiff had exhausted conservative treatment options with respect to his back and that plaintiff was not a good surgical candidate. He, therefore, decided that plaintiff had reached maximum medical improvement, assigned a three percent permanent partial disability rating to plaintiff’s back, and released plaintiff from his care. He stated in his medical note that he felt plaintiff’s leg problems were not causally related to plaintiff’s lower back condition and, therefore, not work related. Regarding a return to work, Dr. Bartko expressed the view that if the back symptoms were plaintiff’s only problem, he would be capable of returning to sedentary or light duty work with restrictions that took his back condition into account. Given, however, the nature and severity of plaintiff’s leg symptoms, Dr. Bartko was doubtful whether plaintiff could realistically even do sedentary to light work.

On 7 November 2001, defendant filed a Form 60, in which defendant admitted plaintiff’s right to compensation for a “back strain.” The Form 60 confirmed that plaintiff was receiving temporary total disability compensation at a rate of \$344.00 per week. On 11 February

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2002, plaintiff filed a Form 33 requesting a hearing “[t]o determine compensability and benefits due plaintiff.” The case was scheduled for a hearing before Deputy Commissioner Bradley W. Houser on 12 August 2002.

In preparation for the hearing, defendant sent plaintiff a letter on 31 July 2002, informing plaintiff that he was scheduled for a return appointment with Dr. Bartko on 2 August 2002. At 6:38 p.m. on the following day, 1 August 2002, defendant’s counsel faxed a letter to Dr. Bartko’s office. A note on the facsimile cover sheet said, “Please see that Dr. Bartko receives these documents *before* Mr. Mayfield’s 8/2/02 2:15 p.m. appt. Thanks.” (Emphasis original.) The faxed letter stated in pertinent part:

My clients, who are Defendants in the above-captioned workers’ compensation claim, have scheduled Mr. Mayfield’s August 2, 2002, appointment with you in order to try and answer the following specific questions.

1. First, as of Mr. Mayfield’s August 2, 2002, appointment with you, should Mr. Mayfield be under any work restrictions *strictly pertaining to his back and resulting from his lower back injury of 01/11/01*, considering the fact that he has not worked or presumably undertaken any other strenuous physical tasks since you released him at maximum medical improvement on September 26, 2001?
2. Is it possible to apportion Mr. Mayfield’s overall disability (that is, the sum of all of the factors medically and physically preventing Mr. Mayfield from returning to work as of August 2, 2002) as between the impairment to Mr. Mayfield’s lower back resulting from his 01/11/01 back injury and his multiple other complaints and conditions, including his left leg complaints, residual stroke symptoms, heart condition, and other physical conditions? *In other words, can you say what percentage of Mr. Mayfield’s inability to return to work is directly attributable to the 3% permanent partial impairment with which you have rated him?*
3. If it is not possible to apportion Mr. Mayfield’s overall disability as between the 3% permanent partial impairment to his lower back, and Mr. Mayfield’s other physical and medical complaints and conditions, is the 3% permanent par-

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tial impairment of Mr. Mayfield's lower back a substantial and material factor in Mr. Mayfield's overall disability?

I would appreciate it if you would answer these three questions in any medical record generated as a result of your August 2, 2002, examination of Mr. Mayfield. I certainly appreciate your time and attention to these questions.

(Emphases original.) Simultaneously, defense counsel faxed a copy of this letter to plaintiff's attorney.

Following plaintiff's appointment, Dr. Bartko responded to the facsimile from defendant's counsel by faxing his office notes to both plaintiff's counsel and defendant's counsel. The office notes specifically addressed the three questions posed by defendant's counsel and stated that the three percent disability rating was assigned for plaintiff's lower back symptoms only and that plaintiff's "inability to work with the restrictions that I have put forth is solely related to his non-work-related problems."

Following the hearing on 12 August 2002 and 4 November 2002, the Deputy Commissioner granted plaintiff's motion for an independent medical examination by Dr. Mark W. Roy, a neurosurgeon. Dr. Roy examined plaintiff on 8 January 2003 and concluded that plaintiff's back strain had caused damage to the nerve running into plaintiff's left leg, which then caused plaintiff's episodic pain in that leg. Dr. Roy further concluded that plaintiff's left leg symptoms were causally related to the back strain that occurred on 11 January 2001.

The Deputy Commissioner filed an opinion and award on 26 September 2003, rejecting plaintiff's contention that Dr. Bartko's testimony was tainted by an improper *ex parte* communication from defendant's counsel and determining that although plaintiff's back injury of 11 January 2001 was compensable, his left lower extremity symptoms were not causally related to his January 2001 injury. The Deputy Commissioner concluded that plaintiff's compensable injury had caused total disability for only the period 19 February 2001 through 26 September 2001.

Plaintiff appealed to the Full Commission. In an opinion and award filed 28 July 2004, the Full Commission modified in part and reversed in part the Deputy Commissioner's decision. The Commission first concluded that defendant's 1 August 2002 contact with Dr. Bartko was improper under *Salaam* and excluded Dr. Bartko's post-1 August 2002 opinions. In addressing the merits of

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plaintiff's claim, the Full Commission found that as a result of the compensable 11 January 2001 injury by accident, plaintiff had sustained an injury to both his back and his leg. The Commission awarded plaintiff total disability benefits from 11 January 2001 "and continuing until further order of the Commission or plaintiff returns to full time employment subject to the attorney fee awarded herein." The Commission also approved Dr. Roy as plaintiff's primary care physician. Defendant timely appealed the Full Commission's decision to this Court.

Discussion

Defendant argues three issues on appeal: (1) whether the Commission erred in excluding evidence from Dr. Bartko under *Salaam*, (2) whether competent evidence supports the Commission's finding that plaintiff's left leg condition and continuing disability after 26 September 2001 are causally related to plaintiff's compensable injury, and (3) whether the Commission erred in approving Dr. Roy as plaintiff's treating physician. Defendant has not brought forward in its brief a number of other assignments of error; they are deemed abandoned. N.C.R. App. 28(b)(6).

Communications Between Defendant and Dr. Bartko

[1] Defendant argues that the faxed communication from defendant to Dr. Bartko on 1 August 2002 did not violate *Crist* and *Salaam* because the communication was not *ex parte* as plaintiff's counsel received a copy. Defendant does not, however, dispute that plaintiff never consented to this communication.

In *Crist*, a medical malpractice case, our Supreme Court upheld a finding by the trial court that defense counsel had acted improperly by talking privately with plaintiff's non-party treating physicians. *Crist*, 326 N.C. at 331, 389 S.E.2d at 44. The Supreme Court concluded that:

[T]he gravamen of the issue is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered. We conclude that considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery. We thus hold that defense counsel may not interview plaintiff's nonparty treating

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physicians privately without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26.

Id. at 336, 389 S.E.2d at 47. This Court in *Salaam* held that the principles in *Crist* applied equally in the worker's compensation context. *Salaam*, 122 N.C. App. at 88, 468 S.E.2d at 539. While *Salaam* and *Crist* both involved oral communications, this Court confirmed in *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 30, 514 S.E.2d 517, 523 (1999) that *Crist* and *Salaam* also controlled with respect to written communications between an employer and the plaintiff's treating physicians.

Defendant focuses exclusively on the question whether the facsimile could be considered an *ex parte* communication. In doing so, however, it overlooks a fundamental aspect of *Crist*. After holding that the statutory waiver of the physician/patient privilege addressed only whether certain information could be disclosed, the Court observed that "the question remains by what procedures and subject to what controls the exchange of information shall proceed." *Crist*, 326 N.C. at 334, 389 S.E.2d at 46. The Court then pointed out that "[o]ther courts have concluded that formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process, via presence of counsel or judicial intervention, if warranted." *Id.* The Court rejected the defendant's objection to depositions as being expensive and time-consuming as well as its objection regarding the tactical advantage given to the plaintiff as "insignificant when compared with the patient-plaintiff's interest in maintaining the confidentiality of personal and possibly embarrassing information, irrelevant to the determination of the case being tried." *Id.* at 335, 389 S.E.2d at 46 (quoting *Nelson v. Lewis*, 130 N.H. 106, 111, 534 A.2d 720, 723 (1987)). For that reason, the Court held that "[d]efendant instead must utilize the statutorily recognized methods of discovery enumerated in N.C.G.S. § 1A-1, Rule 26." *Id.* at 336, 389 S.E.2d at 47.

In short, *Crist* not only forbid *ex parte* communications between a defendant and a plaintiff's physician, but also expressly limited the methods by which a defendant may obtain relevant substantive information to statutorily recognized means. The question before this Court is, therefore, whether defendant's facsimile was a statutorily authorized method of obtaining information.

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In N.C. Gen. Stat. § 97-80 (2003), the General Assembly authorized the Commission to adopt rules providing for and limiting the use of interrogatories and other forms of discovery in workers' compensation cases. In accordance with this authorization, the Commission adopted Rules 605 through 607, governing discovery. Workers' Comp. R. of N.C. Indus. Comm'n 605, 606, & 607, 2005 Ann. R. (N.C.) 935-37. Based on *Crist*, a workers' compensation defendant is limited to obtaining information from a plaintiff's physician by one of the methods recognized in those rules or as provided by other statutes.

Defendants argue that they must be allowed to contact physicians in order to direct medical treatment, to obtain records, or schedule depositions. We note that defendants are entitled by statute to obtain medical records without a plaintiff's consent. N.C. Gen. Stat. § 97-25 (2003) ("[A]n employer paying medical compensation to a provider rendering treatment under this Chapter may obtain records of the treatment without the express authorization of the employee.").¹ While the bare need for other communications cannot trump the fundamental principles set out in *Crist* and *Salaam*, we need not address precisely what non-substantive communications may be permissible since the facsimile at issue in this case cannot by any measure be considered an attempt to direct medical treatment or a non-substantive communication. It was an attempt to obtain evidence for use in the hearing before the Deputy Commissioner.

We also observe that defendant's arguments should, in any event, be presented to the General Assembly. It is for the General Assembly to weigh the policy considerations and determine what methods of disclosure should be permitted. For example, in its most recent session, the General Assembly added N.C. Gen. Stat. § 97-25.6, entitled "Reasonable access to medical information." 2005 N.C. Sess. Laws 4.8, sec. 6.1.

This new subsection of the Workers' Compensation Act provides that "[n]otwithstanding the provisions of G.S. 8-53, any law relating to the privacy of medical records or information, and the prohibition against ex parte communications at common law," an employer or insurer paying medical compensation to a provider rendering treatment under the Workers' Compensation Act may obtain records of that treatment without the express authorization of the employee and, upon written notice to the employee, may obtain directly from the medical provider medical records relating to evalu-

1. This provision was moved from N.C. Gen. Stat. § 97-25 to § 97-25.6 by H.B. 99, 2005-2006 Gen. Assem. (N.C. 2005), 2005 N.C. Sess. Laws 448, sec. 6.1.

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ation or treatment of the current injury or condition for which the employee is claiming compensation. *Id.* The new N.C. Gen. Stat. § 97-25.6 further provides:

An employer or insurer paying compensation for an admitted claim or paying without prejudice pursuant to G.S. 97-18(d) may communicate with an employee's medical provider in writing, *limited to specific questions promulgated by the Commission*, to determine, among other information, the diagnosis for the employee's condition, the reasonable and necessary treatment, the anticipated time that the employee will be out of work, the relationship, if any, of the employee's condition to the employment, the restrictions from the condition, the kind of work for which the employee may be eligible, the anticipated time the employee will be restricted, and the permanent impairment, if any, as a result of the condition. When these questions are used, a copy of the written communication shall be provided to the employee at the same time and by the same means as the communication is provided to the provider.

Id. (emphasis added). This statute became effective on 29 September 2005 "and appl[ies] to claims pending and filed on or after that date." *Id.* sec. 10.

This amendment provides further support for our conclusion that defendant's facsimile was impermissible. The General Assembly has determined that it is necessary to limit the type of questions that may be asked and to ensure that the questions are neutrally drafted. Significantly, defendant's facsimile in this case would not have been allowed under this statute. Nor does the facsimile fall within any permissible form of discovery. While the questions asked are analogous to interrogatories, there is no discovery provision that authorizes posing interrogatories to a non-party. *See Workers' Comp. R. of N.C. Indus. Comm'n* 605, 2005 Ann. R. (N.C.) 935 ("Interrogatories may, without leave of the Industrial Commission, be served upon any party after the filing of a Form 18, Form 18B, or Form 33, or after approval of Form 21.").

Defendant was required to take Dr. Bartko's deposition in order to obtain the information that it sought by its facsimile. If defendant wished to ensure that Dr. Bartko, in the course of his examination of plaintiff, considered certain topics, it was free to work informally with plaintiff's counsel to agree upon a list of issues to submit to the doctor. As the Supreme Court stated in *Crist*, "[w]e do not intend by

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this holding to discourage consensual informal discovery.” 326 N.C. at 336, 389 S.E.2d at 47.

Defendant argues alternatively that *Crist* and *Salaam* do not apply because, due to the time elapsed since Dr. Bartko last saw plaintiff, Dr. Bartko was no longer plaintiff’s treating physician. This argument cannot be reconciled with defendant’s own brief in which it contends that the Commission exceeded its authority in removing Dr. Bartko as the treating physician based on the facsimile communication. That argument presumes Dr. Bartko was plaintiff’s treating physician. Further, we can perceive no factual or legal basis for concluding that Dr. Bartko was transformed from a treating physician into a doctor simply performing an independent medical examination.

[2] Defendant next argues that even if the facsimile was improper, the Commission erred in determining that it improperly tainted Dr. Bartko’s opinions. Since that assessment involves a factual question, the issue for this Court is whether any evidence exists to support the Commission’s finding of taint. Our review of that facsimile indicates that it was not neutrally phrased, but rather was couched in an advocate’s language, designed to affect the answer. Defendants, however, point to the fact that Dr. Bartko had already expressed his opinion a year earlier that plaintiff’s left leg symptoms were not causally related to the 11 January 2001 injury. The facsimile communication, however, focused on different issues: whether and to what extent plaintiff’s back injury contributed to an inability to work. While Dr. Bartko’s September 2001 opinion may be read as suggesting that his back injury and left leg condition were combining to result in total disability, Dr. Bartko’s August 2002 opinion stated that plaintiff’s inability to work was solely related to his non-work-related problems. The Full Commission could reasonably find that this aspect of Dr. Bartko’s opinion was tainted.

In sum, because we agree with the Commission that defendant’s counsel’s facsimile to Dr. Bartko was improper under *Crist* and its progeny, we hold that the Full Commission did not err in excluding from evidence all opinions rendered by Dr. Bartko after 1 August 2002. Therefore, we overrule defendant’s assignments of error pertaining to the exclusion of Dr. Bartko’s August 2002 evidence.

[3] The North Carolina Association of Defense Attorneys has filed a brief *amicus curiae* in which it argues that barring defense counsel from communicating with treating physicians in the manner at issue

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in this case constitutes a violation of defendants' equal protection rights under the North Carolina and United States constitutions. Although defendant has not pressed this argument, it is in any event without merit. Equal protection requires that "all persons similarly situated be treated alike." *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). When distinctions are made among those who are similarly situated—but no suspect class or fundamental right is involved—that distinction must only bear a "rational relationship to some legitimate state interest." *Id.*

Crist and *Salaam* are founded on the confidential relationship between a patient and his or her physician and the need to protect that relationship. When it comes to protecting the plaintiff's interests in confidentiality, defense counsel and plaintiff's counsel are not similarly situated. Defense counsel is adverse to plaintiff and generally has no obligation to keep information obtained from or regarding plaintiff confidential. On the other hand, plaintiff's counsel is ethically bound to confidentiality, Rev. R. of Prof. Conduct of N.C. State Bar 1.6, 2005 Ann. R. (N.C.) 682, and to zealous advocacy of his or her client's best interests, Rev. R. of Prof. Conduct of N.C. State Bar 0.1[2], 2005 Ann. R. (N.C.) 660. In protecting a patient's privacy, there is not the same need to regulate communications between the patient's attorney and the patient's doctor. Thus, the two groups—defense counsel and plaintiff's counsel—are not in this instance similarly situated. The amicus' policy arguments regarding the possibility that a plaintiff's counsel might improperly affect a doctor's testimony are irrelevant to the pertinent question and should be directed to the General Assembly.

Causation of Plaintiff's Left Leg Condition

[4] Defendant next contends that the Full Commission erroneously found that plaintiff's left leg condition was causally related to his compensable back injury. Defendant argues that the Full Commission ignored competent evidence, in the form of Dr. Bartko's and Dr. Kritzer's opinions, and relied on incompetent evidence, in the form of Dr. Roy's opinions.

As our Supreme Court has held, "appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). With respect to the findings of fact, this Court "does

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not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "[T]his Court is bound by such evidence, even though there is [other] evidence that would have supported a finding to the contrary." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980).

Moreover, the Commission is " 'the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 255, 454 S.E.2d 704, 708 (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982)), *disc. review denied*, 340 N.C. 568, 460 S.E.2d 319 (1995). For this reason, the Full Commission "may, of course, properly refuse to believe particular evidence. It may accept or reject all or part of the testimony of . . . any . . . witness, and need not accept even uncontradicted testimony." *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

Defendant argues first that the Commission failed to consider the evidence of Dr. Bartko and Dr. Kritzer. The Commission, however, specifically found that Dr. Kritzer was unable to testify to a reasonable degree of medical certainty regarding any causal relationship between plaintiff's left leg complaints and his 11 January 2001 injury. With respect to Dr. Bartko, the Commission included five findings of fact reciting Dr. Bartko's treatment of plaintiff and his opinions prior to August 2002. The Commission then found: "Regarding the causation opinions given in this matter, the Full Commission gives greater weight to the opinions given by Dr. Roy, than the opinions of Dr. Bartko and Dr. Kritzer."

Thus, the Commission was faced with conflicting opinions and it chose, as it was entitled to do, to give greater weight to Dr. Roy's opinion. We note that defendant's counsel indicated that he had "[n]o objection" when plaintiff's counsel tendered Dr. Roy as a "board certified expert in neurosurgery." Dr. Roy then testified that, in his opinion, to a reasonable degree of medical certainty, plaintiff's complaints regarding his back and left leg were related both to his work-related injury and to congenital and degenerative defects. He could not, however, apportion between the two. He indicated that he was "not really

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too disturbed” by the fact plaintiff sometimes presented with leg pain and no back pain because he observed that with patients “relatively commonly.” Dr. Roy stated that, in his opinion, plaintiff exacerbated or aggravated his pre-existing spondylosis or stenosis when he lifted the hose on 11 January 2001 and, at that time, also irritated or damaged the nerve going into his left leg. This evidence is sufficient to support the Commission’s finding that plaintiff’s left leg condition was caused by his 11 January 2001 injury by accident. *See Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390, 465 S.E.2d 343, 345 (holding that an employee is entitled to total disability when a combination of non-compensable illnesses and a work-related shoulder injury rendered her incapable of working), *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996).

Defendant’s arguments on appeal regarding Dr. Roy go to questions of credibility and weight. While defendant points to portions of Dr. Roy’s testimony that it believes support its position or suggest speculation, this Court has previously noted that “[c]ontradictions in the testimony go to its weight” *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). Further, as Judge Hudson stated in a dissenting opinion adopted by the Supreme Court in *Alexander v. Wal-Mart Stores, Inc.*, 359 N.C. 403, 610 S.E.2d 374 (2005) (per curiam), it is not “the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court’s role is not to engage in such a weighing of the evidence.” *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting).

Accordingly, the Commission’s findings of fact regarding causation are supported by competent evidence and, therefore, conclusive on appeal. When, however, we turn to the Commission’s conclusions of law, they are not consistent with either the findings of fact or the ultimate award.

The Commission made the following findings of fact.

5. . . . Dr. Kritzer was unable to testify to a reasonable degree of medical certainty regarding any causal relationship between plaintiff’s left leg and left lower extremity complaints and his back injury of 11 January 2001.

. . . .

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11. . . . Dr. Bartko opined that plaintiff's left leg and left lower extremity symptoms were not causally related to any back condition, work-related, congenital, degenerative, or otherwise. . . .

. . . .

15. On the issue of causation, Dr. Roy opined that plaintiff's left leg and left lower extremity symptoms were causally related to his 11 January 2001 injury by accident. . . .

. . . .

18. Regarding the causation opinions given in this matter, the Full Commission gives greater weight to the opinions given by Dr. Roy, than the opinions of Dr. Bartko and Dr. Kritzer. . . .

In other words, as discussed above, the Commission found that plaintiff's left leg condition was caused by the 11 January 2001 accident.

The Commission's conclusions of law, however, include the following:

3. On 11 January 2001, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer. N.C. Gen. Stat. §97-2(6). As the result of his 11 January 2001 injury by accident, plaintiff sustained an injury to his back. *Id.* However, based upon the credible lay and medical evidence of record, plaintiff's left leg and lower left extremity symptoms *are not the natural result of, or causally related to his 11 January 2001 injury by accident.* . . .

4. As the result of his 11 January 2001 injury by accident, plaintiff is entitled to have defendant pay total disability compensation at the rate of \$365.12 per week *for the period of 19 February 2001 through 26 September 2001.* . . .

5. Plaintiff is entitled to be paid permanent partial disability compensation for the three percent (3%) rating assigned to his back. N.C. Gen. Stat. §97-31(23).

(Emphases added.)

On the other hand, the Commission's Award states:

1. Defendant shall pay for all related medical expenses incurred as a result of [plaintiff's] 11 January 2001 injury by accident, *including treatment for plaintiff's left leg.*

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2. Defendant shall pay plaintiff temporary total disability benefits at a weekly rate of \$365.12 per week *from 11 January 2001 and continuing* until further order of the Commission or plaintiff returns to full time employment subject to the attorney fee awarded herein.

(Emphases added.)

Based upon our review of the record, it appears that the Full Commission modified the Deputy Commissioner's findings of fact and award in order to allow compensation for the leg condition and total disability after 26 September 2001, but that the Commission did not also modify the conclusions of law. While we recognize that this may be a mere clerical error, we must nonetheless reverse and remand to allow the Commission to resolve the inconsistencies. *See Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 497, 269 S.E.2d 667, 672 (1980) (reversing and remanding to the Full Commission for further proceedings, after holding that the Commission's findings of fact did not justify its conclusions of law).

Approval of Dr. Roy as Primary Care Physician

[5] Finally, defendant argues that the Commission erred in approving Dr. Roy as plaintiff's primary care physician. Defendant notes that the Commission found that "plaintiff's relationship with Dr. Bartko was so compromised by defendant's communication that plaintiff can no longer continue as plaintiff's treating physician. The Full Commission approves Dr. Roy as plaintiff's treating physician." Defendant argues that this was in effect a remedy for the *ex parte* communication and that "[t]here is no case law even suggesting the removal of a physician as authorized treating physician as a remedy for an *ex parte* communication between a defendant and a treating physician." Additionally, defendant contends that the Commission failed to make findings of fact regarding how plaintiff's relationship with Dr. Bartko was compromised.

The Commission's decision to approve a doctor as an employee's treating physician is reviewed for an abuse of discretion. *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 174, 573 S.E.2d 703, 707 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003). Since the Commission's findings of fact are adequate for us to determine the basis for the Commission's decision, we need not remand for further findings.

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When the Commission decides, as here, that a doctor's views have been affected by an improper communication from a defendant, the Commission is entitled to shift the treatment of the plaintiff to another physician. Moreover, the Commission's decision in this case is supported by the Commission's findings that Dr. Bartko had released plaintiff from his care, but plaintiff was still experiencing pain. *See, e.g., Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 520, 577 S.E.2d 326, 332-33 (holding that the Commission did not abuse its discretion in approving treatment by a particular physician when none of the other authorized physicians had successfully provided relief for her condition), *disc. review denied*, 357 N.C. 256, 583 S.E.2d 290 (2003); *Lakey*, 155 N.C. App. at 174, 573 S.E.2d at 707 ("[P]laintiff was released to work by her approved physician while still suffering from pain. Therefore, we do not find that the Commission abused its discretion in allowing approval of plaintiff's physician."). Thus, no basis exists to overturn the Commission's decision to approve Dr. Roy as plaintiff's primary care physician.

Affirmed in part, reversed and remanded in part.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. JAMES LOVE RENFRO, JR., DEFENDANT

No. COA04-1429

(Filed 15 November 2005)

1. Evidence— prior crimes or bad acts—drugs—intent—knowledge

The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case by allowing officers to testify as to the facts and circumstances underlying defendant's two prior convictions for the same offense pursuant to N.C.G.S. § 8C-1, Rule 404(b) for the limited purpose of showing defendant's intent and knowledge. While the testimony of a deputy clerk regarding defendant's guilty pleas in the two prior cases was inadmissible under Rule 404(b), the error was rendered harmless when defendant testified and was properly cross-examined about the convictions under N.C.G.S. § 8C-1, Rule 609(a).

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2. Evidence— stipulation—chain of custody—testing procedures

The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case by allowing into evidence testimony from a city police officer relating to the chain of custody of the cocaine and testing procedures used by the State Bureau of Investigation laboratory, because: (1) defendant previously stipulated to the facts testified to by the officer; and (2) the stipulation is substituted for proof and dispenses with the need for evidence.

3. Sentencing— prior record level—stipulation

The trial court did not commit plain error in a possession with intent to manufacture, sell, or deliver cocaine case by sentencing defendant as a Class C Level IV offender, because the trial court did not use the worksheet which improperly calculated that defendant had fourteen record points to determine defendant's prior record level, but rather relied on defendant's stipulation that he was a Level IV felon with ten prior record points.

Judge ELMORE concurring in part and dissenting in part.

Appeal by defendant from a judgment dated 7 June 2004 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 20 September 2005.

Attorney General Roy Cooper, by James M. Stanley, Jr., for the State.

George E. Kelly, III for defendant.

BRYANT, Judge.

James Love Renfro, Jr. (defendant), appeals a judgment dated 7 June 2004, entered consistent with a jury verdict finding him guilty of possession with the intent to manufacture, sell, or deliver cocaine.

Facts

On 8 April 2003, Officer Ryan Skewes of the Fayetteville Police Department was on patrol in what he considered to be a very high drug trafficking area. Around 1:00 in the morning, as he was sitting in his car, Officer Skewes observed a van pull up to a stop sign and sit there for several minutes. Officer Skewes did not observe any illegal activity, however, he did see “a black male in a blue jersey” “leaning into the driver’s side window” of the van. Officer Skewes also noticed

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four or five other individuals in the street, whom he referred to as “lookouts.” Officer Skewes drove up to the van to investigate the situation. The “lookouts” immediately started to move out of the street and in the direction of a mobile home when Officer Skewes drove up to the van and began to get out of his vehicle.

Officer Skewes testified he immediately recognized the man leaning into the van as defendant because he had spoken to him before. As Officer Skewes approached the van on foot, the van drove away and defendant started to walk away. Officer Skewes testified he told defendant to stop, however defendant continued to walk away. Officer Skewes admitted that at this point defendant had not broken any laws, was not being placed under arrest, and was not required to stop.

Officer Skewes started to walk after defendant and defendant began running whereupon Officer Skewes pursued him on foot. During the pursuit, Officer Skewes saw defendant throw a plastic bag in the vicinity of a truck as he ran past it. Another officer came to assist Officer Skewes and defendant was apprehended and placed under arrest. The officers then returned to the truck defendant had run past and found underneath it a plastic bag containing 16 rocks of individually wrapped and packaged crack cocaine. Defendant was charged with resisting arrest and possession of cocaine.

Procedural History

On 22 September 2003, defendant was indicted for possession with intent to manufacture, sell or deliver cocaine and misdemeanor resisting a public officer. A Special Indictment for Habitual Felon was also issued against defendant. The case came before a jury in the Cumberland County Criminal Superior Court on 3 June 2004, the Honorable Jack A. Thompson presiding. On 7 June 2004, defendant was found guilty of possession with intent to manufacture, sell or deliver cocaine and not guilty of resisting a public officer. Defendant subsequently entered a guilty plea to attaining the status of an habitual felon. Judgment was entered on 7 June 2004 and defendant gave notice of appeal in open court.

Defendant raises three issues on appeal: (I) whether the trial court erred in allowing defendant’s prior convictions into evidence; (II) whether the trial court erred by allowing into evidence testimony relating to the chain of custody of evidence and testing procedures at the State Bureau of Investigation Laboratory; and (III) whether the

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trial court committed plain error by sentencing defendant as a Class C, Level IV offender. For the following reasons, we overrule defendant's arguments.

I

[1] Defendant first argues the trial court erred in allowing his prior convictions into evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence. "It is well established in North Carolina that when the defendant in a criminal trial does not testify, evidence of other offenses is inadmissible if its only relevance is to show the character of the accused or his disposition to commit the offense charged." *State v. Armistead*, 54 N.C. App. 358, 359, 283 S.E.2d 162, 163 (1981) (citing *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954)). However, Rule 404(b) of the North Carolina Rules of Evidence allows for the admission of evidence of prior acts to show a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003).

Rule 404(b) is a rule of inclusion and defendant's prior acts should be excluded if their "only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Nevertheless, the bare fact of a defendant's prior convictions is not admissible under Rule 404(b) absent some offer of evidence regarding the facts and circumstances underlying the prior convictions. *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583 (2002) (reversing this Court's decision and adopting Judge Wynn's dissent in *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (2002)); *State v. Hairston*, 156 N.C. App. 202, 576 S.E.2d 121 (2003).

At trial, the State presented evidence regarding two prior convictions of defendant on the charge of possession with intent to manufacture, sell or deliver cocaine. The State presented details concerning the facts and circumstances underlying defendant's prior convictions and their similarity to the current case through the arresting officers in each case. A deputy clerk was then called to testify regarding defendant's guilty pleas in both cases for the limited purpose of establishing that defendant admitted knowing the substance he had in the prior cases was cocaine and that he intended to sell it.

The trial court found the testimony regarding the facts and circumstances of defendant's prior offenses was admissible to show

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defendant's intent and knowledge. Defendant asked for a limiting instruction and the trial court accordingly instructed the jury that:

[t]his evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime charged in this case, that the defendant had the knowledge, which is a necessary element of the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received.

These facts are similar to, but distinguishable from, those leading to the *Wilkerson* and *Hairston* opinions.

In *Wilkerson*, two officers testified to the facts and circumstances surrounding prior offenses committed by the defendant and a deputy clerk testified regarding the bare facts of the defendant's prior convictions arising out of those offenses. *Wilkerson*, 148 N.C. App. at 311, 559 S.E.2d at 6. However, the defendant did not testify before the jury. *Id.* In adopting Judge Wynn's dissent, the North Carolina Supreme Court established that, "in a criminal prosecution, the State may not introduce prior crimes evidence under Rule 404(b) by introducing the bare fact that the defendant was previously convicted of a crime" *Id.* at 327, 559 S.E.2d at 16. *Wilkerson* reiterated the distinction between other crimes evidence under Rule 404(b) and evidence for impeachment purposes under Rule 609. *Id.* at 319-23, 559 S.E.2d at 12-13. In *Wilkerson*, the other crimes evidence presented by the detectives, and introduced for the limited purpose of showing the defendant's knowledge and intent to sell cocaine, was admissible (assuming it met the 403 balancing test) whether or not the defendant testified. *Id.* at 323-24, 559 S.E.2d at 13-14. Allowing a deputy clerk to testify to the defendant's prior drug convictions where the defendant did not testify was reversible error. *Id.* at 328-29, 559 S.E.2d at 16-17. Such bare fact testimony is admissible only as impeachment evidence under Rule 609 when the defendant testifies at trial.

In *Hairston*, there was no testimony offered to establish the facts and circumstances underlying the defendant's convictions; the State merely called a deputy clerk to testify from court records concerning the defendant's prior convictions. *Hairston*, 156 N.C. App. at 203, 576 S.E.2d at 122. However, the defendant took the stand in his own defense, and was properly cross-examined regarding his prior convictions. *Id.* Following the reasoning of *Wilkerson*, this Court held the trial court erred in admitting testimony regarding the bare facts of the defendant's convictions for substantive purposes under Rule 404(b)

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without introducing evidence of the underlying facts to show similarities between the prior convictions and present offense charged. *Id.* at 205, 576 S.E.2d at 123. The Court went on to note that the defendant testified and was subject to cross-examination regarding his prior convictions, but proceeded with a prejudicial error analysis. The Court determined that the evidence was conflicting (driver of car in which defendant was riding testified drugs belonged to him, not the defendant, and no one else knew drugs were in the car) and “not so overwhelming as to make the trial court’s error in admitting prior convictions evidence non-prejudicial.” *Id.* Notwithstanding that the defendant testified and was subject to impeachment, because it was error to receive the bare fact of conviction through the deputy clerk and allow the jury to consider it under 404(b), **and** because of conflicting evidence, the *Hairston* Court determined there was a reasonable probability a different result would have been reached absent the admission of the evidence. *Id.*

In the instant case, there was testimony from two officers regarding the facts and circumstances underlying defendant’s prior convictions for possession with intent to manufacture, sell or deliver cocaine. Thereafter, a deputy clerk testified to defendant’s actual convictions. This evidence was admitted by the trial court under Rule 404(b) solely for the limited purpose of showing defendant had the intent and knowledge necessary for the charge of possession with the intent to manufacture, sell, or deliver cocaine. Defendant later took the stand in his own defense and was cross-examined on each of the convictions initially introduced by the State. Defendant’s testimony concerning his prior convictions did not conflict with that of the arresting officers or the deputy clerk.

The evidence pertaining to the underlying facts and circumstances of defendant’s prior convictions for possession with intent to manufacture, sell and deliver cocaine were properly admitted under Rule 404(b) and the trial court properly gave a limiting instruction to the jury. While the testimony of the deputy clerk was inadmissible under Rule 404(b), the error was rendered harmless when defendant testified and was properly cross-examined about the convictions pursuant to Rule 609(a). *See, State v. Miller*, 26 N.C. App. 190, 192, 215 S.E.2d 181, 182 (1975). This assignment of error is overruled.

II

[2] Defendant next argues the trial court committed error by allowing into evidence testimony of Officer Ryan Skewes relating to the

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chain of custody of the cocaine and testing procedures used by the State Bureau of Investigation. On cross-examination Officer Skewes testified he had no specific knowledge of the chain of custody relating to the transporting of the evidence once it left his hands, he had no specific knowledge or training regarding SBI testing of controlled substances and related procedures, and that his original testimony was based on speculation and assumptions about what occurred in the SBI lab. Defendant's argument, however, is without merit as defendant had previously stipulated to the facts testified to by Officer Skewes.

The prosecution and defendant entered into an agreement concerning chain of custody and that the material recovered by Officer Skewes was determined to be crack cocaine by SBI laboratory personnel. This agreement was entered into evidence at trial and read aloud to the jury as follows:

The state and the defendant stipulate that the following shall be admissible and uncontested evidence to the trial.

Officer R. Skewes of the Fayetteville Police Department arrested the defendant on April 8, 2003 and seized as evidence State's Exhibit Number 2. Officer R. Skewes requested that State's Exhibit Number 2 be sent to the North Carolina State Bureau of Investigation laboratory for analysis for controlled substances. Special Agent Michael J. Brazil of the North Carolina State Bureau of Investigation examined the contents of State's Exhibit Number 2. Special Agent Brazil is a licensed forensic chemist trained as an expert in the field of forensic chemistry.

Special Agent Brazil's analysis shows that State's Exhibit 2 contains the schedule two controlled substance cocaine in its base form known as crack cocaine and that these contents, excluding the packaging material, weighed 2.7 grams. Special Agent Brazil put the results of his analysis into a written laboratory report which report shall be admitted into evidence as State's Exhibit Number 3. And . . . the defendant does not contest chain of custody of State's Exhibit Number 2.

Our Supreme Court has held that "[n]o proof of stipulated facts is required. The stipulation is substituted for proof and dispenses with the need for evidence." *State v. Mitchell*, 283 N.C. 462, 469, 196 S.E.2d 736, 740 (1973). Furthermore,

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[a] stipulation of fact is an adequate substitute for proof in both criminal and civil cases. Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact.

State v. McWilliams, 277 N.C. 680, 686, 178 S.E.2d 476, 480 (1971) (internal citations and quotation marks omitted). In light of the stipulation at trial, defendant conceded the existence of the facts which are the subject of Officer Skewes' testimony. This assignment of error is overruled.

III

[3] Defendant lastly argues the trial court committed plain error by sentencing defendant as a Class C, Level IV offender. Defendant claims he was sentenced pursuant to the improper calculation of his prior record level on a worksheet submitted by the State to the trial court which improperly calculated that defendant had fourteen prior record points. However, it is clear from the record the trial court did not use the worksheet to determine defendant's prior record level, but rather relied on defendant's stipulation.

Defendant's counsel stipulated as follows:

THE COURT: Do you also consent that the defendant has prior record points of, for habitual status, ten which is record level four?

[DEFENDANT'S COUNSEL]: I would stipulate to that, Your Honor.

The trial court's Judgment states that the court "has determined pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 10." Immediately following the trial court's finding, there is an "X" in the block next to Prior Record Level IV. The trial court's Judgment and sentence are based upon defense counsel's stipulation in open court and not on the Prior Record Level Worksheet.

Section 15A-1340.14 of the North Carolina General Statute provides "[t]he State bears the burden of proving, by the preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2003). A defendant's prior convictions may be proven by any of the following methods:

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- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

Id. See also, State v. Riley, 159 N.C. App. 546, 555-56, 583 S.E.2d 379, 386 (2003); and *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 918 (2005) (where “defense counsel’s statement to the trial court constituted a stipulation of defendant’s prior record level pursuant to N.C.G.S. § 15A-1340.14(f)(1) . . . defendant’s sentence was imposed based upon a proper finding of defendant’s prior record level.”). Thus, based on counsel’s clear stipulation that defendant was a Level IV felon with ten prior record points, defendant’s prior record level was sufficiently proven. This assignment of error is overruled.

No error.

Chief Judge MARTIN concurs.

Judge ELMORE concurs in part, dissents in part.

ELMORE, Judge concurring in part, dissenting in part.

As to sections II and III of the majority’s opinion, I fully concur. However, because section I stretches Rule 609 beyond its plain language and blurs the distinction between Rule 404(b) and Rule 609, I must dissent from it.

Defendant was indicted for possessing cocaine with an intent to sell, manufacture, or deliver. Defendant stipulated that the substance found by Officer Skewes was indeed cocaine, but contested any evidence of possession. Defendant intended to prove his innocence of the crime charged by testifying that he did not throw anything down while running from Officer Skewes. The State, in proving defendant’s intent, sought to introduce evidence from two of his previous crimes under Rule 404(b). After a discussion outside the presence of the jury, the trial court ruled that the State’s proffer of two prior crimes involving cocaine was admissible under Rule 404(b) to prove knowledge and intent.

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Thus, during trial, the State called Officer Gary Womble of the Fayetteville Police Department. Officer Womble testified that he had previously pulled over a car driven by a person who he knew to have a revoked license. Defendant was one of the occupants of the car, and when he was being taken out a small baggy fell from his waistband. Defendant responded by trying to kick it under the car. Upon retrieval, Officer Womble testified that due to its distinctive packaging he considered it to be cocaine that was ready to sell. Officer Womble then compared a picture of the packaged cocaine that fell from defendant's waistband to the packaged cocaine in the current case, determining that the packaging and appearance was very similar.

Next, the State called Lieutenant Chuck Parker with the Cumberland County Sheriff's Office. Lieutenant Parker testified that he had previously arrested defendant after witnessing defendant begin to run upon his arrival, and throw a small bag into a vent under a house. After the bag was retrieved it was identified as packaged small amounts of cocaine. The State also asked Lieutenant Parker to make a comparison between the package thrown down previously and the package retrieved in this case. He too said the packages were very similar.

Then, the State called Tamara Wojtal with the Cumberland County Superior Court Clerk's Office to testify. She testified that defendant had pled guilty to possession with intent to sell cocaine in the incidents involving Officer Womble and Lieutenant Parker. The State used her to review the contents of defendant's files on the two prior incidents, including the arrest warrants, indictments, and plea transcripts. Ms. Wojtal did not testify to the underlying circumstances of defendant's convictions but just that defendant was twice convicted of possession of cocaine with intent to sell based upon guilty pleas. After all three witnesses had testified in the State's case-in-chief the trial court provided only the limiting instruction discussed in the majority opinion: one that addresses Rule 404(b), not Rule 609. *See, e.g.*, N.C.P.I.—Crim. 104.15 (1984) (dealing with Rule 404(b)); N.C.P.I.—Crim. 105.40 (1986) (dealing with convictions under Rule 609).

With these facts before it, the majority holds that the "inherently prejudicial" error created by allowing the deputy clerk to testify as she did was nonetheless rendered essentially harmless solely because defendant took the stand in his own defense. I cannot agree. The distinctions between Rules 404(b) and 609 are fundamental to the State's

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ability to place relevant evidence before the trier of fact and a defendant's decision to testify on his own behalf.

Rule 404(b) states that although evidence of other crimes is *not* admissible "to prove the character of a person in order to show that he acted in conformity therewith[,] [i]t may, however, be admissible for other purposes, such as . . . intent . . . [or] knowledge" N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Although this subsection is one of "inclusion," *see State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001), that tilt toward inclusion is limited to the underlying evidence or circumstances of a prior crime, and does not include evidence of the conviction itself.

A comparison of the plain language of Rule 609 and Rule 404 indicates that *prior convictions* are admissible under Rule 609, while *evidence of other crimes* is admissible under Rule 404(b). Furthermore, it is clear that Rule 609 does not permit the introduction of the evidence underlying the prior convictions; I believe that, similarly, Rule 404(b) generally does not permit the introduction of prior convictions.

State v. Wilkerson, 148 N.C. App. 310, 320-21, 559 S.E.2d 5, 12 (Wynn, J., dissenting), *rev'd per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002) (adopting the reasoning of Judge Wynn's dissent). Introduction of the conviction is controlled by Rule 609, which states:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited *from the witness* or established *by public record during cross-examination or thereafter*.

N.C. Gen. Stat. § 8C-1, Rule 609(a) (2003) (emphasis added). Importantly, impeaching a defendant's credibility or character is not one of the permissible uses of a prior crime under Rule 404(b). *See State v. Cook*, 165 N.C. App. 630, 637, 599 S.E.2d 67, 72 (2004); *Wilkerson*, 148 N.C. App. at 319, 559 S.E.2d at 11. To the contrary, by its plain language Rule 609 controls impeachment and limits the timing and manner in which *prior convictions* can be admitted: "during cross-examination or thereafter," not *before* the witness testifies.

If a defendant does not testify, any record of his convictions is rarely admissible, since the sole purpose of that record is to allow the jury to assess his character for truthfulness. *See Wilkerson*, 148 N.C.

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App. at 319, 559 S.E.2d at 11; N.C. Gen. Stat. § 8C-1, Rule 609 (2003) (official commentary). When a defendant has not testified, his character for truthfulness is irrelevant. Thus the choice for a defendant is always testify and be cross-examined on his prior convictions that will undercut the credibility of what he took the stand to prove, or remain silent, allowing the State to use the similar nature of his previous crimes against him, but not the convictions themselves. Yet, the majority's opinion renders this fundamental choice negligible by allowing the State to introduce prior convictions ostensibly under Rule 609, as well as underlying evidence of those convictions under Rule 404(b), and then allow the defendant to render its error harmless or garner himself a new trial under *Wilkerson*. I cannot condone using Rules 404(b) and 609 to force a defendant to take the stand and attempt to rehabilitate himself before the jury, rendering the State's error harmless, or remain silent and risk a conviction hoping that our Court will be unable to distinguish *Wilkerson*. See, e.g., *State v. McCoy*, 174 N.C. App. 105, — S.E.2d —, — (2005) ("Because we are unable to distinguish this case [in which a conviction was admitted under 404(b)] from *Wilkerson*, we conclude that the trial court committed prejudicial error entitling defendant to a new trial.").

Contrary to the majority's interpretation, *State v. Hairston*, 156 N.C. App. 202, 576 S.E.2d 121 (2003), does not support this reasoning. Although mentioning Rule 609 in its analysis of the issue presented, *Hairston* noted that the Rule allows for impeaching "a defendant's credibility as a witness if the evidence of the convictions is 'elicited from the witness or established by public record *during cross-examination or thereafter.*'" *Id.* at 204, 576 S.E.2d at 123 (quoting N.C. Gen. Stat. § 8C-1, Rule 609 (2003)). Implicitly, by the emphasis placed on the text of the rule, the *Hairston* court recognized that Rule 609 was inapplicable to convictions being introduced by a deputy clerk during the State's case-in-chief. Yet, here, the majority applies it. Further, other than the fact that the defendant in *Hairston* testified, the Court there does not explain why it is applying a "different" prejudicial analysis to the error than that of the Supreme Court in *Wilkerson*. See *Hairston*, 156 N.C. App. at 205, 576 S.E.2d at 123 ("However, unlike *Wilkerson*, defendant here testified and was cross-examined about his prior convictions. Thus, we must determine whether the error was sufficiently prejudicial to defendant so as to require a new trial under N.C. Gen. Stat. § 15A-1447(a) (2001)."); *Wilkerson*, 148 N.C. App. at 328, 559 S.E.2d at 16 (admitting the bare fact of conviction is "inherently prejudicial such that any

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probative value of the conviction is substantially outweighed by the danger of unfair prejudice.”).

Defendant taking the stand here does not change the trial court’s erroneous and “inherently prejudicial” conclusion that the deputy clerk’s testimony was admissible. Nothing about the discussion below concerning the deputy clerk’s testimony suggested that she was being called “for the purpose of attacking the credibility” of defendant, and nothing about the trial court’s limiting instruction suggested that the jury should limit using the clerk’s testimony to a credibility assessment. Further, nothing about allowing the State to preemptively impeach defendant with his convictions in its case-in-chief, (or do so by having the deputy clerk testify instead of just facing a denial of the conviction with an introduction of a certified copy of the record), is congruent with Rule 609.

As Judge Wynn noted in *Wilkerson*:

By permitting the State to introduce the bare fact of a defendant’s prior conviction, we permit the jury to surmise that the defendant, having once formed the necessary intent or developed the requisite *mens rea*, undoubtedly did so again; after all, another jury has already conclusively branded the defendant a criminal. Such leaps of logic, which inescapably treat the prior conviction as propensity evidence, are prohibited by Rule 404(b); the defendant is impeached without ever taking the stand, and is ineluctably labeled a criminal by the present jury. Thus, introducing the bare fact of a prior conviction under Rule 404(b) fails to satisfy the Rule 403 balancing test, as the only fair interpretation of the purpose behind the State’s introduction of such evidence is impermissible: that the evidence is being offered to show the defendant’s predisposition to commit the crime charged.

Wilkerson, 148 N.C. App. at 328, 559 S.E.2d at 16. Even though defendant took the stand here, the impression on the jury, and thus the prejudice to defendant, are exactly the same. The State even argued as such in its closing statement.

Look at the type of crime, ladies and gentlemen. Possession with intent to sell or deliver cocaine, that’s what he was convicted of in these two cases, what he stands trial for in these two cases. Look at the location in these first two cases. Again, just a couple hundred yards away from each other, just one street corner to the next, the dates, April 8, 2003; November 5, 1997; August 21, 2000.

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He went to jail for that same charge and he is back out on the streets doing the same things.

I cannot agree with the majority that defendant received a fair trial free of prejudicial error just because he took the stand and rendered otherwise “inherently prejudicial” error harmless. Instead, I would remand defendant’s case for a new trial on the charge of possession with intent to sell or deliver cocaine.

SUZANNE HILL, FORD GOUDEY, MARY SUSAN SCHMIDT, C.H. BALLOU, DORA DEAN BALLOU, A.C. BLANKENSHIP STEVE A. BROCK, JEAN BURROWS, CAROLYN B. BYRD, D.S. BYRD, JOSEPH CANOSA, J.L. CASTLEBERRY, MARGIE R. CASTLEBERRY, ALBERT CHAPPELL, JEAN CHAPPELL, LEWIS CLARKE, BRENDA DAVIS, J. CHRIS DAVIS, JOSEPHINE DAVIS, JIM FRENCH, ANNE B. GILLIAM, JAMES GILLIAM, ANN J. GOLD, W.A. GOLD, EMILY GRAHAM, LUKE GRUBER, PRICE TAYLOR HARRISON, L.B. HASKINS, JAMES M. HAYWARD, VIRGINIA C. HAYWARD, L. JARVIS HERRING, SALLY HERRING, CLARA INSCOE, RALPH JOHNSON, CLINTON LEWIS, BARBARA D. MARTIN, JESSICA L. MARTIN, JOSEPH McCLURE, JANIL MILLER, JOHN MILLER, GENE W. MORRISON, HERBERT PARKIN, BARBARA PAERL, MICHELLE S. PITTMAN, GILBERT M. POTTER, PAT I. POTTER, JOAN H. PULLEY, W. PAUL PULLEY, JR., ARTHUR RITTMASER, KEITH RITTMASER, CAROLYN ROGERS, ROBERT F. ROSER, DENISE ROSER, LENA RUDDER, HAZEL SIMPSON, KERRY SINCLAIR, C.W. STAMPER, DAWN STEWART, MACK STYRON, VICKY THAYER, DEBORAH BOYCE TODD, EDWIN LEE TODD, GWENDOLYN TOWLES, THELMA P. WARD, JAMES R. WHEATLEY, MACK WILLIS, EDITH YORK, LAWRENCE B. WILSON, JR., ELIZABETH B. WILSON, PLAINTIFFS-APPELLANTS v. MICHAEL TAYLOR, DEFENDANT-APPELLEE

No. COA04-1698

(Filed 15 November 2005)

1. Real Property— landing—Marketable Title Act—possession exception

The trial court erred in an action to quiet title and for a declaratory judgment regarding the ownership of a landing by granting defendant’s motion for a directed verdict as to plaintiffs Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring, and Suzanne Hill, but did not err by granting defendant’s motion for directed verdict as to Gene W. Morrison, because: (1) plaintiffs established prima facie ownership of an easement in the landing pursuant to *Realty Co. v. Hobbs*, 261 N.C. 414 (1964), and the Marketable Title Act; (2) the possession exception did not operate to preclude

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plaintiffs from relying on the Marketable Title Act to establish prima facie ownership; (3) defendant's possession only protected whatever interest defendant owned at the commencement of the action, which was the date the marketability of plaintiffs' title was determined; (4) it was within the province of the jury to determine whether plaintiffs owned interests in the landing and, if so, whether defendant owned an interest which defeated plaintiffs' interests; and (5) Gene W. Morrison did not offer a thirty-year connected chain of title under the Marketable Title Act and failed to demonstrate prima facie ownership of an easement in the landing.

2. Real Property— landing—burden of proof—prima facie record title—on-the-ground location of landing

The trial court erred in an action to quiet title and for a declaratory judgment regarding the ownership of a landing by granting defendant a directed verdict at the close of all evidence on the ground that plaintiffs failed to locate the description of the landing contained in their chains of title on the earth's surface, because: (1) if there is any competent evidence locating a tract of land on the ground, the issue of location becomes a jury question and a directed verdict is not proper; and (2) plaintiffs presented sufficient competent evidence establishing the on-the-ground location of the landing.

Appeal by plaintiffs from judgment entered 14 May 2004 by Judge Kenneth F. Crow in Superior Court, Carteret County. Heard in the Court of Appeals 24 August 2005.

Kirkman Whitford & Brady, P.A., by Neil B. Whitford, for plaintiffs-appellants.

Wheatly, Wheatly, Nobles, Weeks, Valentine and Lupton, P.A., by C.R. Wheatly, Jr. and C.R. Wheatly, III, for defendant-appellee.

McGEE, Judge.

Plaintiffs claim an interest in a tract of real property in Carteret County depicted as Lot 1 Block 6, bearing the legend "Landing for Lot owners" (the landing), on a plat captioned "Map Showing Property of Beaufort Houseing [sic] Corporation" (the plat). The plat was recorded in Map Book 1, Page 226, Carteret County Registry on 26 February 1945. The plat lays out various lots and streets in a subdivision, including the landing.

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Beaufort Housing Corporation conveyed various lots, including lots currently owned by several plaintiffs, and referenced the plat in the conveyances. From the 1940's to the present time, there generally has been a dock or pier extending from the landing into the waters of Taylor's Creek. Since the 1940's, owners of property within the subdivision, including several plaintiffs and their predecessors in interest, have used the landing and various piers located thereon for access to Taylor's Creek.

Defendant recorded a deed dated 16 July 1993 which purported to convey to defendant the same real property as that encompassed in the landing. In 1997 or 1998, defendant constructed a new pier extending from the landing. A year or so later, defendant constructed a gate on the pier and marked the gate with a "private dock" sign.

Plaintiffs filed this action on 14 July 2000 by securing an order extending the time to file their complaint. Plaintiffs filed a complaint to quiet title and for declaratory judgment on 2 August 2000 and an amended complaint on 1 September 2000. Lawrence B. Wilson, Jr. and Elizabeth B. Wilson were plaintiffs in a parallel case, 2000-CVS-000786. By stipulation and order filed 26 April 2004, 2000-CVS-000786 was dismissed and consolidated with the present case, and Lawrence B. Wilson, Jr. and Elizabeth B. Wilson were added as plaintiffs in this case.

Plaintiffs alleged in their complaint that they

(a) [were] the owners of the lot identified[] as "Landing for lot owners," on the plat recorded in Book 1, page 226, Carteret County Registry, and they, or their predecessors in title [had] been owners of said plat since the recording of said plat [in] February, 1945; or,

(b) in the alternative [held] an easement to and right to use the lot identified[] as "Landing for lot owners," on the plat recorded in Book 1, page 226, Carteret County Registry, and they, or their predecessors in title, [had] been owners of said plat since the recording of said plat [in] February, 1945.

Plaintiffs also alleged that defendant claimed an estate or interest in real property adverse to plaintiffs and that defendant was obstructing plaintiffs in their use of the landing. Defendant answered and counterclaimed, alleging that he was the owner in fee simple of the real property described by plaintiffs as the landing.

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At trial, plaintiffs introduced into evidence a deed dated 26 April 1945 from B.B. Montague and Myra Montague to Beaufort Housing Corporation, which purportedly transferred ownership of the landing to Beaufort Housing Corporation. Therefore, plaintiffs asserted Beaufort Housing Corporation owned the landing when it conveyed lots to plaintiffs' predecessors in interest.

Elizabeth B. Wilson's chain of title dated back to a 20 July 1946 deed from Beaufort Housing Corporation. This deed purported to convey "all of lot 6 in Block 5 as shown on the plat entitled 'Beaufort [Housing] Corporation[,] same having been prepared in February 1945, and recorded in Plat Book 1, page 226, of the Carteret County Public Registry."

L. Jarvis Herring and Sally Herring traced their title back to a 19 April 1946 deed from Beaufort Housing Corporation. This deed purported to convey "[a]ll of Lot #3, Block 4, as shown on the plat entitled 'Property of Beaufort [Housing] Corporation[,] same having been prepared in February 1945, and recorded in Book 1, Page 226, Carteret County Public Registry."

Suzanne Hill traced her chain of title back to a deed from Beaufort Housing Corporation dated 7 February 1946. This deed purported to convey "all of lot #26, Block 5, as shown on the plat entitled 'Property of Beaufort [Housing] Corporation[,] same having been prepared in February 1945, and recorded in Plat Book 1, Page 226, Carteret County Public Registry."

Plaintiffs introduced a deed from Louis Dorme and Ruby B. Dorme to Gene W. Morrison and V. Lorrayne Morrison, dated 20 January 1972. This deed purported to convey title to "Lot Number Three (3), in Block Six (6), according to that plan entitled 'Beaufort [Housing] Corporation,' same being prepared in February, 1945, and recorded in Map Book 1, at page 226, Carteret County Registry."

At the conclusion of plaintiffs' evidence, defendant moved for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 50 (2003). The trial court granted defendant's motion as to all plaintiffs except Lawrence B. Wilson, Jr., Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring and Suzanne Hill (remaining plaintiffs). In support of its ruling, the trial court determined that the North Carolina Real Property Marketable Title Act (Marketable Title Act) did not apply because of the exception to the Marketable Title Act at N.C. Gen. Stat. § 47B-3(3) (the possession exception).

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Defendant presented his evidence as to remaining plaintiffs. Defendant's evidence was followed by a rebuttal from remaining plaintiffs. At the conclusion of all the evidence, defendant renewed his Rule 50 motion for a directed verdict. The trial court granted defendant's motion as to remaining plaintiffs. The trial court orally stated the bases for its ruling. First, the trial court reiterated its ruling that the Marketable Title Act did not apply by virtue of the possession exception and directed a verdict for defendant on that ground. Second, the trial court also directed a verdict for defendant on the basis that remaining plaintiffs never established the on-the-ground location of the landing in accordance with *Day v. Godwin*, 258 N.C. 465, 128 S.E.2d 814 (1963).

Lawrence B. Wilson, Jr. dismissed his appeal on 22 November 2004. Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring, Suzanne Hill and Gene W. Morrison (hereinafter plaintiffs) appeal.

On appeal, plaintiffs assign error to the trial court's grant of defendant's motion for directed verdict as to Gene W. Morrison at the close of plaintiffs' evidence. Plaintiffs also assign error to the trial court's grant of defendant's motion for directed verdict as to Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring, and Suzanne Hill at the close of all the evidence.

When ruling on a motion for a directed verdict, a trial court must "consider the evidence in the light most favorable to the non-movant, and determine whether the evidence is sufficient as a matter of law to be submitted to the jury." *Town of Highlands v. Edwards*, 144 N.C. App. 363, 366, 548 S.E.2d 764, 766, *disc. review denied*, 354 N.C. 74, 553 S.E.2d 212 (2001). The non-movant "is entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in favor of the nonmoving party." *Merrick v. Peterson*, 143 N.C. App. 656, 661, 548 S.E.2d 171, 175, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). The trial court should deny the motion "if there is more than a scintilla of evidence supporting each element of the nonmovant's case." *Freese v. Smith*, 110 N.C. App. 28, 33-34, 428 S.E.2d 841, 845 (1993). "Under this standard, this Court must determine whether [the] plaintiff's evidence, when considered in the light most favorable to [the] plaintiff, was legally sufficient to withstand [the] defendants' motion for a directed verdict as to [the] plaintiff's claims." *Merrick*, 143 N.C. App. at 661, 548 S.E.2d at 175.

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Pursuant to N.C. Gen. Stat. § 41-10 (2003), “[a]n action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]” In order to establish a *prima facie* case for removing a cloud on title, two requirements must be satisfied: “(1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to [the] plaintiff’s title, estate or interest.” *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004) (citing *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998)). “[O]nce a plaintiff establishes a *prima facie* case for removing a cloud on title, the burden rests upon the defendant to establish that his title to the property defeats the plaintiff’s claim.” *Id.* (quoting *Wetherington*, 127 N.C. App. at 461, 490 S.E.2d at 597).

I.

[1] Plaintiffs argue the trial court erred in ruling that plaintiffs could not rely on the Marketable Title Act to prove their *prima facie* interests in the landing and in granting defendant’s motions for directed verdict on that ground. The trial court ruled that plaintiffs could not use the Marketable Title Act to prove their interests because defendant was and had been in possession of the real property at the time the suit was filed. However, the trial court erroneously applied the possession exception to the Marketable Title Act.

The purpose of the Marketable Title Act is to facilitate the alienability and marketability of real property. N.C. Gen. Stat. § 47B-1(1) (2003). The Marketable Title Act accomplishes this goal by allowing the establishment of marketable title upon a showing of a thirty-year chain of title to real property, “with nothing appearing of record . . . purporting to divest such claimant of the estate claimed.” N.C. Gen. Stat. § 47B-2(b) (2003). This showing of marketable title is “prima facie evidence that such person owns title to the real property described in his record chain of title.” N.C. Gen. Stat. § 47B-2(d) (2003).

Once such a claimant establishes marketable title, the Marketable Title Act operates to extinguish “all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period[.]” except those listed in N.C. Gen. Stat. § 47B-3. N.C. Gen. Stat. § 47B-2(c) (2003). The possession exception under N.C. Gen. Stat. § 47B-3(3) is one such exception.

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Under that exception, “[s]uch marketable record title shall not affect or extinguish the following rights: . . . (3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.” N.C. Gen. Stat. § 47B-3(3) (2003).

Our Supreme Court interpreted the possession exception to the Marketable Title Act in *Heath v. Turner*, 309 N.C. 483, 308 S.E.2d 244 (1983). In *Heath*, the plaintiffs and the defendants established competing marketable titles to various interests in the lots in controversy. *Id.* at 491-92, 308 S.E.2d at 249. However, the defendants were in possession of the lots at the time the plaintiffs filed their action to quiet title. *Id.* at 493, 308 S.E.2d at 250. The defendants argued that they were “entitled to all of the interests” in the lots. *Id.* at 491, 308 S.E.2d at 248. The Court held that

the fact that the defendants were in possession of the lands in question serves as a defense against a competing marketable record title but does not, under the Marketable Title Act, establish title in the defendants. Stated differently, whatever rights the defendants have because they are in possession of the property are not taken away by a competing marketable record title but the mere fact of possession by the defendants does not alone establish their ownership of the land. It (possession) only protects whatever ownership the defendants already have on the date that marketability is to be determined.

Id. at 493, 308 S.E.2d at 249-50.

In *Heath*, at the time the plaintiffs filed their action, the defendants were in possession of the lots in controversy and had acquired title to an 8/11 undivided interest in the lots by adverse possession. *Id.* at 493, 308 S.E.2d at 250. Therefore, “even if the plaintiffs had a marketable record title on that date under the Real Property Marketable Title Act, it could not affect or extinguish the defendants’ title previously acquired by adverse possession because that title is an interest protected by G.S. § 47B-3(3).” *Id.* However, the defendants’ possession “[did] not give them any title which they did not already have.” *Id.* at 494, 308 S.E.2d at 250. The plaintiffs retained title to a 3/11 undivided interest despite the defendants’ possession. *Id.* at 497, 308 S.E.2d at 252.

As illustrated by *Heath*, the possession exception does not operate automatically to defeat a thirty-year marketable record title. The

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Court held that possession “only protect[ed] whatever ownership the defendants already [had] on the date that marketability [was] . . . determined.” *Id.* at 493, 308 S.E.2d at 249-50. A possessor of real property has a burden to establish the possessor’s rights in the property in controversy because mere possession “does not . . . establish title[.]” *Id.* at 493, 308 S.E.2d at 249. The possession exception will only operate to defeat a competing marketable title if the possessor carries the burden of showing the possessor owns the real property.

It is well settled that a lot owner who purchases real property in reliance on a plat depicting certain amenities obtains an interest in those amenities. Our Supreme Court has held that

[w]here lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement.

Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citing *Steadman v. Pinetops*, 251 N.C. 509, 112 S.E.2d 102 (1960) and *Conrad v. Land Co.*, 126 N.C. 776, 36 S.E. 282 (1900)). The Court further stated,

It is said that such streets, parks and playgrounds are dedicated to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant.

Hobbs, 261 N.C. at 421, 135 S.E.2d at 36 (internal citation omitted).

In the present case, Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring and Suzanne Hill introduced exhibits to establish their respective chains of title of more than thirty years from Beaufort Housing Corporation. Each of their chains of title contained a deed from Beaufort Housing Corporation which referenced the plat entitled, “Property of Beaufort [Housing] Corporation.” The plat depicted Lot 1 Block 6 of the subdivision as a “Landing for Lot owners.” See *Barton v. White*, 173 N.C. App. 717, 721, 620 S.E.2d 278, 281 (2005) (noting that express words on a recorded plat can raise a justiciable issue as to a grantor’s intent to create an easement appurtenant). Plaintiffs also introduced a deed purporting to show that Beaufort Housing Corporation owned the real property designated as

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the landing when it conveyed lots to plaintiffs' predecessors in interest. Therefore, plaintiffs established *prima facie* ownership of an easement in the landing pursuant to *Hobbs* and the Marketable Title Act. The burden shifted to defendant to establish that his title to the property defeated plaintiffs' claims. *Hensley*, 163 N.C. App. at 307, 593 S.E.2d at 414.

The possession exception did not operate to preclude plaintiffs from relying on the Marketable Title Act to establish *prima facie* ownership. Defendant's possession only protected whatever interest defendant owned at the commencement of the action, which was the date the marketability of plaintiffs' title was determined. *See Heath*, 309 N.C. at 493, 308 S.E.2d at 250 (noting that marketability is determined as of the date the action was commenced). It was within the province of the jury to determine whether plaintiffs owned interests in the landing, and if so, whether defendant owned an interest which defeated plaintiffs' interests. Therefore, the trial court erred by granting defendant's motion for directed verdict as to Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring, and Suzanne Hill at the close of all the evidence.

Gene W. Morrison, however, offered only one deed, dated 20 January 1972, into evidence to establish his title. Plaintiffs commenced their action on 14 July 2000, which is the date that marketability was determined. Therefore, Gene W. Morrison did not offer a thirty-year connected chain of title under the Marketable Title Act and failed to demonstrate *prima facie* ownership of an easement in the landing. Accordingly, the trial court properly granted defendant's motion for directed verdict as to Gene W. Morrison.

II.

[2] Plaintiffs also argue the trial court erroneously granted defendant a directed verdict at the close of all the evidence on the ground that plaintiffs failed to locate the description of the landing contained in their chains of title on the earth's surface. In addition to plaintiffs' burden of showing *prima facie* record title to the landing, plaintiffs also had the burden of establishing the on-the-ground location of the landing. *Chappell v. Donnelly*, 113 N.C. App. 626, 629, 439 S.E.2d 802, 805 (1994). Where a plaintiff relies on deeds as proof of title, a plaintiff must " 'locate the land by fitting the description in the deeds to the earth's surface.' " *Id.* (quoting *Andrews v. Bruton*, 242 N.C. 93, 96, 86 S.E.2d 786, 788 (1955)).

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In *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959), our Supreme Court noted:

The rules applicable to the ascertainment of boundaries trace back to the early history of the State. They are firmly established by numerous consistent decisions.

What are the boundaries is a matter of law to be determined by the [trial] court from the description set out in the conveyance. Where those boundaries may be located on the ground is a factual question to be resolved by the jury.

In *Paper Company v. Jacobs*, 258 N.C. 439, 442, 128 S.E.2d 818, 820 (1963), our Supreme Court held that if there is any competent evidence locating a tract of land on the ground, the issue of location becomes a jury question and a directed verdict is not proper. In the present case, plaintiffs presented sufficient competent evidence establishing the on-the-ground location of the landing. Therefore, the trial court erred by directing a verdict for defendant on that basis at the close of all the evidence.

In *Poe v. Bryan*, 12 N.C. App. 462, 183 S.E.2d 790 (1971), our Court held that the plaintiffs offered sufficient evidence to locate the description of the disputed property on the ground. *Id.* at 468, 183 S.E.2d at 794. In *Poe*, one of the plaintiffs testified that she had been familiar with the boundaries of the tract of land since she was a child. *Id.* at 466, 183 S.E.2d at 792. She testified that she knew where the lines and boundaries were located and testified about their location. *Id.* at 466, 183 S.E.2d at 792-93. Our Court held that “the testimony of the feme plaintiff and the [trial] court appointed surveyor constitutes sufficient evidence that the description of the . . . deed fits the land and embraces the land in controversy.” *Id.* at 467, 183 S.E.2d at 793.

Likewise, in the present case, plaintiffs presented abundant testimony from plaintiffs themselves and from other witnesses who were familiar with the location of the landing. Ronald Quidley, an owner of property in the subdivision, testified that he had been familiar with the landing since he was a child. He testified that the landing was located at the south end of Seaview Street and served as the subdivision swimming area. Gene W. Morrison testified that he lived one lot removed from the landing and that he mowed the grass on the landing for about ten years. Sally Herring testified that she had lived on Front Street, a few lots away from the landing, since 1947. She further testified that the landing on Front Street served as the subdivision

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swimming area. Suzanne Hill also testified that she was familiar with the landing. She testified there was a dock on the landing when she moved to the subdivision in 1968 and that the children in the subdivision used the lot to fish and swim in Taylor's Creek. Plaintiffs offered this evidence to establish that the landing was bounded on the north by Front Street, on the south by Taylor's Creek and on the east and west by the extension of the boundaries of Seaview Street toward Taylor's Creek.

The present case is also analogous to *Jacobs*. In *Jacobs*, the plaintiff, as in this case, had the burden of showing the on-the-ground location of the claimed real property. *Jacobs*, 258 N.C. at 441, 128 S.E.2d at 820. However, in *Jacobs* the plaintiff "offered no witness who testified to having surveyed the boundaries set out in the several deeds under which [the plaintiff's predecessor in interest] claimed. It did not attempt to establish any of the corners called for in those instruments. The surveyor testified he merely plotted the lines on his map." *Id.* at 442, 128 S.E.2d at 820. Nonetheless, the question of the on-the-ground location of the real property was properly left to the jury. *Id.* at 444, 128 S.E.2d at 822.

In the present case, plaintiffs presented the testimony of James W. Thompson (Mr. Thompson), an attorney specializing in real property law. Mr. Thompson testified that plaintiffs' exhibit number six was a deed which conveyed the landing to Beaufort Housing Corporation. Mr. Thompson plotted the landing on the plat by indicating where the landing was located on the plat.

Defendant later presented the testimony of James L. Powell (Mr. Powell), a professional land surveyor. Mr. Powell testified that in 1993 he surveyed the real property defendant claimed to own. On cross-examination, Mr. Powell testified that the area he surveyed completely encompassed the landing, described as Lot 1 on Page 226 of Map Book 1 in the Carteret County Registry. The testimony of Mr. Powell, defendant's own surveyor, clearly showed that the landing, Lot 1, was located on the earth's surface at the south end of Seaview Street.

In *Day*, our Supreme Court held that the plaintiff failed to locate the disputed real property on the ground. *Day*, 258 N.C. at 470-71, 128 S.E.2d at 818. The Court held that a plaintiff cannot meet its burden on this issue by merely superimposing a plat of the property onto an aerial photograph. *Id.* at 470, 128 S.E.2d at 818. The Court reasoned that because the plaintiff lacked personal knowledge about the loca-

tion of the disputed boundaries and because the plaintiff did not conduct a survey of the real property, the plaintiff failed to locate the real property on the ground. *Id.* at 470, 128 S.E.2d at 817-18.

In the present case, plaintiffs presented the testimony of Loie Priddy (Mr. Priddy), the Chief of the Coastal Survey Unit for the Unit Survey Section of the North Carolina Department of Natural Resources. Mr. Priddy testified that he superimposed the plat onto an aerial photograph of the region encompassing the landing. However, plaintiffs did not rely solely on the testimony of Mr. Priddy. As a result of the additional testimony reviewed above, the issue of where the landing was located upon the earth's surface was an issue for the jury. Accordingly, the trial court erred by directing a verdict for defendant on this basis.

Affirmed in part; reversed and remanded in part.

Judges McCULLOUGH and JACKSON concur.

IN THE MATTER OF: L.O.K., J.K.W., T.L.W., AND T.L.W.

No. COA04-1684

(Filed 15 November 2005)

1. Termination of Parental Rights— second petition after first voluntarily dismissed—not barred

DSS was not barred from filing a second petition to terminate parental rights after voluntarily dismissing its first petition. The Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the Legislature expressed in the Juvenile Code.

2. Termination of Parental Rights— bench trial—hearsay—no showing of prejudice

Assuming that testimony in a termination of parental rights proceeding was inadmissible hearsay, respondent did not carry her burden of showing that the trial court relied on the incompetent evidence in making its findings.

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3. Termination of Parental Rights— findings of neglect— sufficient

Findings that children had been neglected and that there was a probability of repetition if the children were returned to respondent's custody were sufficient to establish neglect. Furthermore, the trial court's conclusion that grounds existed for termination is supported by the court's findings establishing that respondent failed to maintain contact with her children for extended periods of time. N.C.G.S. § 7B-1111(a)(1).

4. Termination of Parental Rights— hearing—poor audio recording—no showing of prejudice

Respondent in a termination of parental rights hearing failed to show prejudice from a poor audio recording of the hearing where the record contains no indication that respondent made any attempt to reconstruct the missing material or that she was in any way unable to do so.

Appeal by respondent from order entered 7 July 2004 by Judge Philip W. Allen in Alamance County District Court. Heard in the Court of Appeals 17 August 2005.

Jamie L. Hamlett for petitioner-appellee.

Sophie W. Hosford for respondent-appellant.

GEER, Judge.

The respondent mother appeals the trial court's order terminating her parental rights to her four minor children, L.O.K., T.L.W., T.L.W., and J.K.W.¹ Respondent argues primarily that Rule 41(a)(1) of the Rules of Civil Procedure required that the trial court dismiss the petition to terminate her parental rights because the Alamance County Department of Social Services ("DSS") had dismissed a prior petition after having rested its case. Because we hold that this aspect of Rule 41(a)(1) does not apply in proceedings to terminate parental rights and because respondent's remaining assignments of error are without merit, we affirm.

Respondent did not specifically assign error to any of the trial court's 109 findings of fact apart from a general statement that the

1. For the purposes of this opinion, we refer to the older T.L.W. as "T.W." and the younger T.L.W. as "T.L.W." Respondent has a fifth child who is not involved in this appeal.

trial court's conclusions of law are not supported by clear and convincing evidence. It is, however, well established that a "broadside exception that the trial court's conclusion of law is not supported by the evidence, does not present for review the sufficiency of the evidence to support the entire body of the findings of fact." *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). In the absence of a specific assignment of error, a trial court's findings of fact are deemed to be supported by competent evidence and are conclusive on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

In this case, the trial court's findings of fact in its order terminating respondent's parental rights and the findings in prior unchallenged orders establish the following facts. At the time of the termination hearing, L.O.K. was 12 years old, T.W. was 10 years old, T.L.W. was 8 years old, and J.K.W. was 6 years old. L.O.K. had not seen respondent for at least three years prior to the hearing, while the other three children had not seen respondent for at least two years.

L.O.K. and T.W. were first taken into custody by DSS on 17 March 1995. On 18 May 1995, the trial court determined that L.O.K. and T.W. were neglected children. The mother stipulated that (1) L.O.K. had unexplained cigarette burns on his leg, (2) respondent's husband had sliced L.O.K. on his neck and hand, (3) the husband threatened L.O.K., (4) respondent violated a protection plan in which she agreed not to leave her children alone with her husband, and (5) respondent had failed to enforce a domestic violence protective order. Subsequently, the court attempted a trial placement with respondent: L.O.K. was returned to his mother's home on 16 August 1996, while T.W. was returned on 20 December 1996. On 19 January 1997, however, both children were again removed because respondent's husband was still living with the family despite the domestic violence protection order prohibiting respondent's husband from entering the home.

T.L.W., who was approximately a year old, was also adjudicated as neglected on 24 April 1997. On 23 October 1997, the trial court entered an order directing DSS to cease efforts to reunify the three children with their parents. At a subsequent permanency planning hearing, however, the trial court determined that L.O.K.'s father had received an active prison term, respondent had secured a divorce

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from him and had not seen him in a year, and the threat of danger from her inability to protect the children no longer existed. The trial court, therefore, entered an order on 2 November 1998 requiring DSS to resume reunification efforts.

On 23 December 1998, L.O.K., T.W., and T.L.W. were again placed with their mother. Respondent quit her job the next day, with the result that she had four children (including another baby, J.K.W.) in her home with no income. Respondent did not contact DSS to request assistance or otherwise seek help with food stamps or daycare. The children were removed on 8 January 1999 because respondent was “in a distressed emotional state” and DSS was concerned for the children’s safety and welfare.

At a review hearing on 19 April 1999, the trial court ordered weekend visitation between respondent and the children. Because of conditions observed during the weekend visitation on 26 July 1999, DSS obtained non-secure custody of the approximately year-old J.K.W. “due to the environmental conditions of the home not being safe for the four juveniles to remain at the residence.”

On 8 November 1999, DSS attempted a trial placement of J.K.W. with respondent. On 9 December 1999, respondent failed to pick J.K.W. up from daycare and did not check on the welfare of J.K.W. until 10:00 p.m. that evening. J.K.W. was placed back into foster care. The following morning, respondent told the DSS social worker that she could not bring herself to pick up her child from daycare, that she could no longer care for J.K.W., and that she would sign a voluntary relinquishment of parental rights to her four children. She did not, however, ever follow through on the voluntary relinquishment. J.K.W. was adjudicated to be a neglected child on 3 January 2000.

On 21 January 2000, respondent agreed to a visitation schedule for J.K.W. On 11 February 2000, however, respondent was 30 minutes late for her visit and was not truthful regarding her reason for being late. On 21 February 2000, respondent also failed to appear for a permanency planning hearing. The trial court, therefore, entered an order ceasing reunification efforts. DSS filed a petition for termination of parental rights on 24 August 2000.

In February 2001, when respondent became pregnant with her fifth child, she moved to “Room at the Inn” in Greensboro, a home for single and expectant mothers. At that time, DSS spoke to respondent for the first time in several months and asked why she had not kept

in contact with DSS. When respondent indicated that she did not think she needed to keep in touch, the DSS social worker explained that it was necessary in order to indicate that she was making an effort to regain her children and to allow DSS to assist in providing services. While at "Room at the Inn," respondent progressed into "Partnership Village," a facility for integrating homeless people into society and received training in medical office technology at Guilford Technical Community College. Respondent ultimately had a paying job at "Room at the Inn" and had her own apartment, automobile, and the use of a cell phone.

From February 2001 until 16 June 2002, respondent maintained "some contact" with the DSS social worker. A hearing on DSS' petition to terminate respondent's parental rights was held on 26 February 2002, 27 February 2002, and 1 March 2002. After DSS rested its case and while respondent was presenting her case, DSS voluntarily dismissed the petition.

In July 2002, respondent left "Room at the Inn" for Cleveland, Ohio. She did not, however, leave a forwarding address or telephone number. After learning from others that respondent might have moved to Ohio, DSS made numerous efforts to locate her, including sending letters and copies of court orders to respondent's relatives in Ohio. On 15 October 2002, DSS filed a second petition for termination of parental rights.

DSS finally located respondent in January 2004 through Child Support Parent Locator services. From January 2004 until the termination hearing, respondent declined to make further contact with DSS except for a telephone conversation on 1 April 2004. In that telephone conversation, DSS reminded respondent that it was okay for her to send the children cards and letters. While respondent had on one occasion after January 2001 provided DSS with cards for her children and she had delivered a second card for L.O.K. in May 2002, she sent no cards or letters from July 2002 through the date of the termination hearing. During that period, respondent also failed to make contact with the children's foster parents to inquire about the condition of the children; failed to send the children any gifts; and failed to attend permanency planning and review hearings of which she had knowledge.

In Ohio, respondent first lived with her sister. She obtained employment at McDonald's for three months. After at least eight months of unemployment, respondent then began working at Wal-Mart.

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Although respondent testified that she had a car and childcare, she provided no further details and DSS was unable to verify any of her living and working arrangements.

Following hearings on 26-27 April 2004, 29 April 2004, 5 May 2004, 7 May 2004, and 2 June 2004, the trial court entered an order on 7 July 2004 terminating respondent's parental rights to L.O.K., T.W., T.L.W., and J.K.W. The trial court denied respondent's motions to dismiss (filed as to each child), in which she contended that the second petition was barred by DSS' dismissal of the first petition. The court determined that grounds for termination existed as to each child, concluding (1) that respondent had neglected each child and (2) that respondent had willfully left each child in foster care for more than 12 months without showing reasonable progress under the circumstances in correcting the conditions that led to the removal of the children. Respondent filed notice of appeal from that order on 12 July 2004.

I

[1] Respondent first argues that the trial court erred in denying her motions to dismiss. Respondent contends that under Rule 41(a)(1), DSS could not voluntarily dismiss without prejudice the first petition for termination of parental rights since it had already rested its case. According to respondent, DSS was required, at that point, to obtain a court order declaring that the dismissal was without prejudice and that DSS' failure to do so barred the second petition. *See Pardue v. Darnell*, 148 N.C. App. 152, 157, 557 S.E.2d 172, 176 (2001) (holding that when the plaintiffs took a voluntary dismissal after resting their case and without seeking a voluntary dismissal from the court under Rule 41(a)(2), it "was a voluntary dismissal with prejudice, barring them from refileing suit against defendant"). We disagree.

The General Assembly has set out the judicial procedure to be used in juvenile proceedings in Chapter 7B of the General Statutes. *See* N.C. Gen. Stat. § 7B-100 (2003) ("This Subchapter shall be interpreted and construed so as . . . (1) To provide procedures for the hearing of juvenile cases."). This Court has previously held that "[t]he Rules of Civil Procedure, while they are not to be ignored, are not superimposed upon these hearings." *In re Allen*, 58 N.C. App. 322, 329, 293 S.E.2d 607, 612 (1982). Instead, the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code. *Compare In re D.L.*, 166 N.C. App.

574, 577, 603 S.E.2d 376, 379 (2004) (“[w]here the relevant juvenile statute [was] silent,” the court applied N.C.R. Civ. P. 5(a), regarding methods of service, to termination proceedings), *with In re J.N.S.*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 650-51 (2004) (summary judgment is “implicitly prohibit[ed]” by the Juvenile Code because it conflicts with the court’s obligation to hear the evidence and make findings of fact under N.C. Gen. Stat. § 7B-1109(e) (2003)), *and In re Tyner*, 106 N.C. App. 480, 483, 417 S.E.2d 260, 261 (1992) (a default judgment may not be entered against a parent because it would require termination “even when the facts do not support termination and thereby permit termination inconsistent with the best interests of the child”).

To hold that a dismissal of a petition for termination of parental rights precludes a second petition, as defendant urges here, would be “contrary to the procedural mandate set forth in our juvenile code.” *J.N.S.*, 165 N.C. App. at 539, 598 S.E.2d at 651. N.C. Gen. Stat. § 7B-1109(e) requires that the trial court “take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent” in the best interests of the child. As this Court held in *J.N.S.* and *Tyner*, such a conflict precludes application of a rule of civil procedure.

Further, N.C. Gen. Stat. § 7B-201 (2003) provides: “When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.” *See also In re Arends*, 88 N.C. App. 550, 554, 364 S.E.2d 169, 171 (1988) (“[O]nce jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined.” (quoting *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E.2d 469, 476 (1958))). Applying Rule 41 to preclude subsequent petitions for termination cannot be reconciled with this continuing jurisdiction.

Finally, our General Assembly has stressed in the Juvenile Code that the “best interests of the juvenile are of paramount consideration.” N.C. Gen. Stat. § 7B-100(5). *See also In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 564 (“[T]he common thread running throughout the Juvenile Code, § 7B-100 *et seq.*, is that the court’s primary concern must be the child’s best interest.”), *appeal dismissed and disc. review denied*, 356 N.C. 163, 568 S.E.2d 608-09 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673, 123 S. Ct. 1799 (2003). When

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it is not in the juvenile's best interest to be returned home, the juvenile must "be placed in a safe, permanent home within a reasonable amount of time." N.C. Gen. Stat. § 7B-100(5). *See also* N.C. Gen. Stat. § 7B-1100(1) (2003) (The General Assembly "recognize[s] the necessity for any juvenile to have a permanent plan of care at the earliest possible age.").

Allowing a voluntary dismissal of one petition to preclude the filing of a second petition would be antithetical to a child's best interests because it would result in no permanent plan of care for the child. If termination of parental rights could be foreclosed by Rule 41, children who could not be returned to their parents would be stranded indefinitely in the foster care system. Here, the children have already spent much of their childhood in foster care: at the time of the termination hearings, L.O.K. and T.W. had been in foster care for nine years, T.L.W. for seven years, and J.K.W. for five years. The children are entitled to a permanent plan of care that cannot be foreclosed by Rule 41.

Accordingly, we hold that DSS was not barred from filing a second petition to terminate parental rights after voluntarily dismissing its first petition. The trial court properly denied respondent's motions to dismiss.

II

[2] Respondent next argues that the trial court erred by improperly admitting hearsay evidence from the children's foster parents and a social worker regarding statements by the children and their teachers. Even assuming *arguendo* that this testimony constituted inadmissible hearsay, respondent has failed to demonstrate that the trial court's order must be reversed.

In a bench trial, "the rules of evidence are not so strictly enforced as in a jury trial and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *Stanback v. Stanback*, 31 N.C. App. 174, 180, 229 S.E.2d 693, 696 (1976), *disc. review denied*, 291 N.C. 712, 232 S.E.2d 205 (1977). "Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial." *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Under this principle, respondent bore the burden of showing that the trial court relied on the incompetent evi-

dence in making its findings. *In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

Respondent has not met her burden. With respect to the children's statements, respondent acknowledges that the trial judge expressly stated that he was disregarding the children's statements in reaching his decision, but she argues that "it is impossible to completely do so" because it was "emotionally charged, prejudicial evidence." This argument turns the applicable standard on its head and asks this Court to presume that the trial judge did in fact rely upon the children's statements despite his assurance otherwise. Further, respondent makes no argument at all about whether the trial court relied upon statements attributed to the children's teachers. Because respondent has failed to rebut the presumption that the trial court disregarded inadmissible evidence in making its findings, we overrule this assignment of error.

III

[3] Respondent next assigns error to the trial court's determination that respondent neglected the children and that she willfully left the children in foster care for more than 12 months without making reasonable progress to correct the conditions that led to the children's removal from respondent's care. Although respondent contends on appeal that the trial court's conclusions are not supported by clear, cogent, and convincing evidence, respondent's failure to specifically assign error to any of the trial court's findings of fact precludes this Court from reviewing that issue. The sole question properly before this Court is whether the trial court's conclusions of law are supported by its findings of fact. *In re Padgett*, 156 N.C. App. 644, 649, 577 S.E.2d 337, 340 (2003).

The trial court first concluded that N.C. Gen. Stat. § 7B-1111(a)(1) (2003) justified termination of respondent's parental rights. Under N.C. Gen. Stat. § 7B-1111(a)(1), the court may terminate parental rights upon a finding that "[t]he parent has abused or neglected the juvenile." A child is considered neglected "if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1). N.C. Gen. Stat. § 7B-101(15) (2003) in turn defines a neglected child as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, . . . ; or who has been abandoned; or who is not provided necessary medical care; or who is not provided neces-

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sary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law."

In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child "at the time of the termination proceeding." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis omitted). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Id.* at 713-14, 319 S.E.2d at 231. Termination may not, however, be based solely on past conditions that no longer exist. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). Nevertheless, when, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). In those circumstances, a trial court may find that grounds for termination exist upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect." *Id.*

In this case, the trial court found that each of the children had previously been adjudicated to be neglected and that there is a probability of repetition of neglect if the children are returned to respondent's custody. The court specifically based that determination on the facts that, subsequent to the initial adjudication of neglect, (1) four, if not five, trial placements had failed; (2) respondent had a history of failing to show a positive response to counseling and educational programs; (3) respondent left a stable job and housing in Greensboro for Ohio where she did not have employment or independent housing; (4) respondent had offered uncertain evidence of stability in her working and living arrangements in Ohio; (5) respondent had to date been unable to cope with the pressure of caring for more than one child at a time and, if custody were restored to her, she would now have five children; and (6) respondent did not seek outside assistance when she needed it.

These findings are sufficient to establish neglect under N.C. Gen. Stat. § 7B-1111(a)(1). *See In re Leftwich*, 135 N.C. App. 67, 72, 518 S.E.2d 799, 803 (1999) (trial court could properly find a probability of future neglect when respondent mother had not made meaningful progress in improving her lifestyle); *In re Davis*, 116 N.C. App. 409,

414, 448 S.E.2d 303, 306 (the parents' failure to "obtain[] continued counseling, a stable home, stable employment, and [attend] parenting classes" was sufficient to show a probability that neglect would be repeated if the child were returned to the care of the parents), *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994); *In re Johnson*, 70 N.C. App. 383, 389, 320 S.E.2d 301, 305-06 (1984) (improper care during a trial placement, a failure to make lifestyle changes, and sporadic attendance at counseling sessions constituted evidence of neglect).

Further, the trial court's conclusion that grounds existed for termination under N.C. Gen. Stat. § 7B-1111(a)(1) is also supported by the court's findings establishing that respondent failed to maintain contact with her children for extended periods of time. *See In re Graham*, 63 N.C. App. 146, 151, 303 S.E.2d 624, 627 (holding that the respondent's lack of involvement with his children for a period of more than two years established a pattern of abandonment and neglect; "[o]ne communication in a two year period does not evidence the personal contact, love, and affection that inheres in the parental relationship" (internal quotation marks omitted)), *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983); *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) ("Neglect may be manifested in ways less tangible than failure to provide physical necessities. . . . [T]he trial judge may consider . . . a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship.").

Under N.C. Gen. Stat. § 7B-1111(a), the trial court need only find that one statutory ground for termination exists in order to proceed to the dispositional phase and decide if termination is in the child's best interests. *Shermer*, 156 N.C. App. at 285, 576 S.E.2d at 407. Since we have concluded that the trial court properly concluded that the ground of neglect existed, we need not review the other ground relied upon by the trial court. *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground of neglect found by the trial court.").

IV

[4] Respondent's final argument on appeal is that the poor audio recording of the termination hearing resulted in an inadequate transcript for purposes of appeal. All juvenile adjudicatory and dispositional hearings must be "recorded by stenographic notes or by

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electronic or mechanical means.” N.C. Gen. Stat. § 7B-806 (2003). “Mere failure to comply with this statute standing alone is, however, not by itself grounds for a new hearing.” *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003). A party must also demonstrate that the failure to record the evidence resulted in prejudice to that party. *Id.*

General allegations of prejudice are insufficient to show reversible error resulting from gaps in the recording. *Id.* As this Court stated in *Clark*, “[w]here a verbatim transcript of the proceedings is unavailable, there are ‘means . . . available for [a party] to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing.’” *Id.* (quoting *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)). Any disputes among the parties regarding the content of testimony, objections, or rulings can be resolved by the trial judge in settling the record on appeal. *Id.*; see also N.C.R. App. P. 9(c)(1) (providing for narration of the evidence in the record on appeal and, if necessary, settlement of the record by the trial court).

In this case, respondent alleges only that “it is unclear whether some of the objections or trial court’s rulings might have been omitted from the recording and from the transcript” and that the poor recording “has raised substantial questions about what might not have [been] recorded, including evidentiary objections and court rulings.” The record contains no indication that respondent made any attempt to reconstruct the missing material under N.C.R. App. P. 9(c) or that she was in any way unable to do so. Without such a showing, respondent has failed to demonstrate prejudice from the flawed recording. *Clark*, 159 N.C. App. at 83, 582 S.E.2d at 662; *Miller*, 92 N.C. App. at 354, 374 S.E.2d at 469 (appeal dismissed when party alleged failure to record proceedings, but the party failed to attempt to reconstruct the proceedings through a narration of the evidence); *In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (no prejudice shown where party failed to allege or describe the contents of the lost testimony).

Affirmed.

Judges CALABRIA and ELMORE concur.

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JEAN MARIE OSETEK, PLAINTIFF v. JASON LEE JEREMIAH, DEFENDANT

No. COA04-742-2

(Filed 15 November 2005)

1. Damages and Remedies— medical—instructions—presumption of reasonableness

Although the trial court in an automobile accident case did not give plaintiff's requested instruction on the rebuttable presumption of the reasonableness of medical charges, the instructions given were accurate statements of law and were fully supported by the evidence.

2. Motor Vehicles— new trial denied—instructions proper

A new trial was not warranted for erroneous and inadequate instructions in an automobile accident case where the court properly instructed the jury.

3. Motor Vehicles— rear-end collision—contributory negligence—directed verdict denied

The trial court correctly granted plaintiff's motion for directed verdict on contributory negligence in an automobile accident case where plaintiff testified that she was stopped at a stop sign when she was hit, and defendant admitted that he was looking to his left as he drove straight ahead and that he could have seen plaintiff's car if he had been looking. Defendant failed to offer any evidence that plaintiff was negligent.

Judge HUNTER concurring in part and dissenting in part.

Appeal by plaintiff from an order filed 11 December 2003 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 January 2005. Unpublished opinion filed 16 August 2005. Petition for rehearing granted 19 September 2005, reconsidering the case without the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the opinion filed 16 August 2005.

E. Gregory Stott for plaintiff-appellant.

Hall & Messick, L.L.P., by Jonathan E. Hall and Kathleen M. Millikan, for defendant-appellee.

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BRYANT, Judge.

Jean Marie Osetek (plaintiff) appeals from an order filed 11 December 2003 denying her motion for judgment notwithstanding the verdict (JNOV) and for a new trial for damages arising out of a car accident with Jason Lee Jeremiah (defendant).

On 17 April 2001, plaintiff was operating her car in a southerly direction on Merchant Drive in Apex, North Carolina. Plaintiff stopped her car at a stop sign. Defendant failed to stop his car and drove into the rear end of plaintiff's car.

Plaintiff filed a complaint on 8 March 2002 requesting monetary damages from defendant for personal injuries sustained as a result of the accident. On 1 May 2002, defendant filed an answer which denied negligence and alleged plaintiff was contributorily negligent. By consent order dated 23 September 2003, this case was transferred to the Superior Court Division of Wake County.

At trial, plaintiff tendered and offered into evidence various medical bills totaling \$15,554.30 incurred for treatment of her injuries. In addition to her own testimony, plaintiff presented testimony of her chiropractor, Dr. Robert Baric and several other witnesses before resting her case-in-chief.

Plaintiff and defendant's motions for directed verdict at the close of plaintiff's evidence and at the close of all evidence were denied. Plaintiff's motion on the issue of contributory negligence was allowed, all other motions were denied.

During the charge conference, plaintiff offered written requests for special jury instructions on the issues of presumptions and damages which were denied. After the trial court concluded its instructions to the jury, plaintiff renewed objections to the instructions and renewed requests for instructions to the trial court.

The jury returned a verdict answering the first issue, "Was Jean Marie injured by the negligence of the defendant, Jason [Lee] Jeremiah?" "Yes"; and the second issue, "What amount is the plaintiff entitled to recover for her personal injuries?" "\$600.00." On 14 August 2003, a written judgment was entered by the trial court for plaintiff to receive \$600.00 in damages for personal injuries.

On 18 August 2003, plaintiff filed a written motion pursuant to Rules 50, 59 and 60 of the North Carolina Rules of Civil Procedure for JNOV and for a new trial. By order filed on 11 December 2003, the

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trial court denied plaintiff's motion for JNOV and for a new trial. Plaintiff appealed.

On appeal plaintiff raises the following issues whether the trial court erred in: (I) failing to submit plaintiff's requested jury instructions; (II) signing and entering the 14 August 2003 judgment; and (III) denying plaintiff's motion for JNOV and for a new trial. Defendant cross-assigns as error whether the trial court erred in (IV) entry of a directed verdict on the issue of plaintiff's contributory negligence.

I

[1] Plaintiff argues the trial court failed to properly instruct the jury on the issue of presumptions related to the reasonableness of medical care charges and personal injury damages, and she is therefore entitled to a new trial. We disagree.

To prevail on the issue of whether her requested instructions should have been given to the jury, plaintiff must demonstrate that:

(1) the requested instruction was a correct statement of the law, and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested, and (4) such failure likely misled the jury.

Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002). A jury charge will be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed. *Bass v. Johnson*, 149 N.C. App. 152, 560 S.E.2d 841 (2002). Refusal of a requested charge is not error where the instructions fairly represent the issues. *Bowers v. Olf*, 122 N.C. App. 421, 428, 470 S.E.2d 346, 351 (1996). The decision whether to give jury instructions is within the trial court's sound discretion, and will not be overturned absent an abuse of discretion. *Blackmon v. Bumgardner*, 135 N.C. App. 125, 138, 519 S.E.2d 335, 343 (1999).

Plaintiff contends the trial court should have instructed the jury as follows on the portion of North Carolina Pattern Jury Instructions (N.C.P.I.—Civ. 101.62 (motor veh. vol. 2004)): “[Y]ou will accept as conclusive and binding on you that the charges for hospital, medical, chiropractic, therapy and medication, as to which the plaintiff testified, are reasonable in amount, unless you find that the defendants have produced evidence to the effect that the charges are not reasonable.”

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N.C. Gen. Stat. § 8-58.1 creates a rebuttable mandatory presumption of the reasonableness of medical charges under certain conditions¹. N.C.G.S. § 8-58.1 (2003). Where a plaintiff introduces medical bills in support of her testimony, unless the defendant rebuts this presumption with other evidence, the jury must find that the amount is reasonable. *Jacobsen v. McMillan*, 124 N.C. App. 128, 134, 476 S.E.2d 368, 371-72 (1996).

Analyzing the facts in the instant case, plaintiff presented her medical expenses to the jury, which were challenged by defendant's rebuttal evidence. The parties did not stipulate to plaintiff's medical expenses, which left "an issue" for the jury to resolve. *See Blackmon* at 134, 519 S.E.2d at 341 ("[b]ecause the parties did not stipulate to . . . damages, [this issue was] to be considered by the jury.").

Defendant's rebuttal evidence challenged whether plaintiff's medical treatment and expenses from the 2001 collision were reasonable and necessary. Defendant's evidence showed plaintiff had been receiving chiropractic care since 1995 for low back pain resulting from a prior collision. Testimony from the chiropractor and the physical therapist showed plaintiff accumulated substantial medical bills for various other treatments. Defendant's evidence challenged the legitimacy of these treatments and whether the resulting medical charges were a proximate cause of the 2001 collision with defendant.

Thereafter, the trial court gave the following instructions in pertinent part:

The Plaintiff may also be entitled to recover actual **damages**. On this issue, the **burden of proof is on the Plaintiff**. This means that the Plaintiff must **prove by the greater weight of the evidence the amount of actual damages proximately caused by the negligence of the Defendant, Jason Lee Jeremiah. Actual damages are the fair compensation to be awarded to the person for any past, present or future injury proximately**

1. N.C. Gen. Stat. § 8-58.1 states:

Injured party as witness when medical charges at issue—Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian . . . is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges.

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caused by the negligence of another. The total of all damages are to be awarded in one lump sum. Such damages may **include medical expenses, loss of earnings, pain and suffering, and permanent injury.** I would now explain the law of damages as it relates to each of these. Medical expenses includes all hospital, doctor, chiropractic, physical therapy and drug bills **reasonably paid or incurred by the Plaintiff as a proximate result of the negligence of the Defendant.** . . .

Members of the jury, if you reach th[e] issue [of damages], I want to caution you that you're not to mention, discuss or consider in any respect any matter that is not in evidence in this case which did not arise as a reasonable inference from the evidence in this case in arriving at the amount of damages you award. This is most important because your consideration of such matters would have to be based on speculation, and might well be inaccurate and could result in an injustice to one party or the other. Also, for you to consider or speculate on any matter not in evidence or not reasonable [sic] inferred from the evidence in arriving at the amount of damages would be a violation of your oath as a juror, which binds you to follow the law as given you by the Court in arriving at your verdict. **The appropriate measure of damages in this case given you by the Court is provided by law, and you should consider this measure only.** I instruct you that if you reach this issue, your decision should be **based on the evidence and the rules of law I've given you with respect to the measure of damages. You're not required to accept the amounts of damages suggested by the parties or their attorneys.** Your award should be fair and just. You should remember that you're not seeking to punish either party and you're not awarding or withholding anything on the basis of sympathy or pity. Finally, as to this second issue [of damages] on which the Plaintiff has the burden of proof, **if you find by the greater weight of the evidence the amount of actual damages proximately caused by the negligence of Defendant, Jason Lee Jeremiah, then it would be your duty to write that amount in the blank space provided. If, on the other hand, you fail to so find, it would be your duty to write a nominal number, such as one dollar, in the blank space provided.**

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Here, the trial court's instructions as to plaintiff's medical treatment and damages were accurate statements of law and were fully supported by the evidence. Moreover, there is nothing to indicate the jury was in any way misled. Therefore, we find the trial court has properly instructed the jury. This assignment of error is overruled.

II & III

[2] We combine issues II and III, in which plaintiff challenges the trial court's denial of her motions for judgment notwithstanding the verdict and for a new trial.

Whether to grant or deny a motion for a judgment notwithstanding the verdict or a new trial is within the sound discretion of the trial jury and absent a manifest abuse of discretion, the trial court's ruling will not be disturbed. *Fenz v. Davis*, 128 N.C. App. 621, 624, 495 S.E.2d 748, 751 (1998); *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). An assignment of error concerning the signing and entry of a judgment "presents only the question of whether an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form." *Green v. Maness*, 69 N.C. App. 403, 407, 316 S.E.2d 911, 913, *disc. rev. denied*, 312 N.C. 622, 323 S.E.2d 922 (1984).

Plaintiff argues a new trial is warranted because the instructions as given by the trial court were inadequate and erroneous as a matter of law. Because we have found the trial court properly instructed the jury under the law, this assignment of error is overruled.

IV

[3] Defendant cross-assigns as error the trial court's granting of plaintiff's motion for directed verdict as to contributory negligence.

A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury and supports a verdict for the plaintiff. *Wiggins v. Paramount Motor Sales, Inc.*, 89 N.C. App. 119, 121, 365 S.E.2d 192, 194 (1988). Where a defendant pleads contributory negligence, "a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). Evidence which merely raises a conjecture as to plaintiff's negligence will not support a jury instruction. *Radford v. Norris*, 74 N.C. App. 87,

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88, 327 S.E.2d 620, 621, *disc. rev. denied*, 314 N.C. 117, 332 S.E.2d 483 (1985) (citation omitted).

In the instant case, plaintiff testified, “I drove through the parking lot to the exit that goes out to 64 because that would be how I go home. I stopped at the stop sign. I was turned left watching for traffic to clear. It was pretty busy, because it was lunchtime. And I was hit.” Plaintiff further testified she had been stopped for “a good while” before she was hit. Defendant admitted he did not know what plaintiff was doing because he was looking to his left while driving straight ahead. On cross-examination, defendant stated that had he been looking straight, before starting to move forward, he could have seen plaintiff’s stopped car. Defendant failed to offer any evidence to show plaintiff was negligent. Therefore the trial court’s ruling on plaintiff’s motion for directed verdict as to contributory negligence was proper. *See Maye v. Gottlieb*, 125 N.C. App. 728, 482 S.E.2d 750 (1997) (affirming the trial court’s directed verdict in favor of plaintiff where “defendants have failed to provide more than a scintilla of evidence supporting plaintiff’s contributory negligence”). This assignment of error is overruled.

Affirm.

Judge JACKSON concurs.

Judge HUNTER concurs in part, dissents in part.

HUNTER, Judge, concurring in part, dissenting in part.

Although I concur with the majority’s holding as to defendant’s cross-assignment of error of the trial court’s grant of plaintiff’s motion for directed verdict, I respectfully dissent from the majority’s holding as to the trial court’s failure to give plaintiff’s requested jury instructions. Based on this Court’s ruling in the case of *Griffis v. Lazarovich*, 161 N.C. App. 434, 588 S.E.2d 918 (2003), *disc. review denied*, 358 N.C. 375, 598 S.E.2d 135 (2004), I would hold that the trial court erred in failing to give the requested instruction as to the mandatory presumption on the issue of medical damages.

Plaintiff contends that N.C. Gen. Stat. § 8-58.1 creates a mandatory presumption on the issue of the amount of medical damages, and that N.C. Gen. Stat. § 8C-1, Rule 301 requires the court to give such an instruction upon request. I agree.

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Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges.

Id. Rule 301 states: “When the burden of producing evidence to meet a presumption is satisfied, the court *must* instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.” N.C. Gen. Stat. § 8C-1, Rule 301 (2003) (emphasis added).

It is the trial court's duty to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. *King v. Bass*, 273 N.C. 353, 354, 160 S.E.2d 97, 98 (1968). “ ‘ ‘ ‘It is said that “ ‘the rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court[s].’ ” ’ ’ ’ *Id.* at 354, 160 S.E.2d at 98 (citations omitted). Our courts have held that

“when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.”

McLain v. Taco Bell Corp., 137 N.C. App. 179, 182, 527 S.E.2d 712, 715 (2000) (citation omitted).

In *Griffis v. Lazarovich*, the plaintiff contended, as in this case, that the trial court erred in failing to instruct the jury that the amount of her medical expenses was presumed reasonable. *Griffis*, 161 N.C. App. at 442, 588 S.E.2d at 924. The Court in *Griffis* noted that:

N.C.R. Evid. 301 states that the trial court must instruct the jury when a statutory or judicial presumption exists. N.C. Gen. Stat.

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§ 8C-1, Rule 301 (2001). N.C. Gen. Stat. § 8-58.1 (2001) creates a mandatory presumption of reasonableness for a plaintiff's medical expenses if the medical expenses are an issue and evidence is presented showing the total charges.

Id. Therefore, *Griffis* held that an instruction on the mandatory presumption of reasonableness as to medical expenses must be given to the jury when such expenses are at issue and there is evidence of the total charges. In *Griffis*, the Court determined that the amount of medical expenses had already been stipulated to by the parties and were not at issue, and therefore found no error in the failure to give the instruction. *Id.*

Here, as the majority notes, the amount of medical expenses was at issue and was contested by both sides. Further, evidence of the total charges for the expenses was presented by plaintiff and records of expenses were submitted into evidence. Therefore, under the statutory requirements of N.C. Gen. Stat. § 8-58.1, Rule 301, and this Court's holding in *Griffis*, plaintiff's request for instructions as to the mandatory presumption of reasonableness for medical expenses was correct in itself and supported by evidence.

Here, a review of the instructions indicates that the substance of the requested instructions was not given to the jury. The trial court instructed the jury that the burden of proof of damages was on plaintiff and that such damages "may include medical expenses, loss of earnings, pain and suffering, and permanent injury." The trial court also defined medical expenses for the jury. However, nowhere in the instructions did the trial court instruct the jury as to the rebuttable presumption that such charges were reasonable, as required by N.C. Gen. Stat. § 8-58.1.

As the requested instruction was correct and supported by the evidence, the trial court's failure to give the substance of the requested instruction constitutes reversible error. *McLain*, 137 N.C. App. at 182, 527 S.E.2d at 715. I would, therefore, grant a new trial as to damages.

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STATE OF NORTH CAROLINA v. MICHAEL TYRONE STOKES

No. COA05-234

(Filed 15 November 2005)

1. Motor Vehicles— felonious fleeing to elude arrest—sufficiency of indictment

The indictment was sufficient to charge defendant with felonious fleeing to elude arrest because: (1) the language of the indictment tracks N.C.G.S. § 20-141.5, and alleges all of the elements defined by the statute and the elements necessary to elevate the offense from a misdemeanor to a felony; and (2) the United States Supreme Court has consistently declined to impose a requirement mandating states to prosecute only upon indictments which include all elements of an offense.

2. Motor Vehicles— felonious fleeing to elude arrest—jury instructions—gross impairment

The trial court did not commit plain error in a felonious fleeing to elude arrest case by failing to define the legal requirements for the necessary element of “gross impairment” in the jury instructions, because: (1) the language used in the statute and jury instructions accords with the ordinary meaning of the term “gross impairment” and is understandable; and (2) the legislature did not intend for the words “grossly impaired” to mean anything other than their common and ordinary meaning.

3. Motor Vehicles— felonious fleeing to elude arrest—theory of guilt

The trial court in a prosecution for felonious fleeing to elude arrest did not improperly instruct the jury on a theory of guilt different from that set forth in the indictment, because: (1) although the State alleged three aggravating factors in the indictment to support the charge, the plain language of the statute only requires proof of two or more of the factors to support a felony conviction; and (2) the State’s evidence supported the charges of defendant’s reckless driving and gross impairment of defendant’s faculties set forth in the indictment.

4. Motor Vehicles— felonious fleeing to elude arrest—motion to dismiss—sufficiency of evidence

The trial court did not err in a felonious fleeing to elude arrest case by denying defendant’s motions to dismiss at the close

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of the State's evidence and at the close of all evidence based on alleged insufficient evidence of speeding and gross impairment, because: (1) the lack of evidence or the State's abandonment of speeding in excess of fifteen miles per hour over the legal speed limit as an aggravating factor did not constitute error when the State was only required to prove two of the three factors listed in the indictment to elevate the crime from a misdemeanor to a felony; and (2) sufficient evidence was presented to support a conclusion by the jury that defendant was grossly impaired including that defendant had a strong odor of alcohol about him; defendant's eyes were very red, glazed, and glassy; defendant's speech was hard to understand; defendant repeatedly used profanity against the officers; defendant told an officer that he was going to die; defendant drove one-half mile with the lower portion of an officer's body hanging out of the window of defendant's vehicle; defendant had to be forcibly removed from his vehicle; and defendant testified he consumed six to seven beers at a local bar between 9:30 pm and 1:00 am, and admitted he was under the influence of alcohol when he pulled off from the traffic stop.

5. Criminal Law— jury instruction—officer's duty—not improper comment on evidence

The trial court did not improperly comment on the evidence during its instructions on assault with a deadly weapon on a government officer by its statement that "arresting a person for driving while impaired is a duty of a Greensboro police officer" when there was no evidence that defendant was arrested or charged with driving while impaired where the officer was investigating a possible driving while impaired offense at the time of the alleged assault, and the court's instruction related to whether the officer was performing a duty of his office at the time of the assault.

Appeal by defendant from judgment entered 12 June 2001 by Judge Russell G. Walker, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General N. Morgan Whitney, Jr., and Special Deputy Attorney General Melissa L. Trippe, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

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[174 N.C. App. 447 (2005)]

TYSON, Judge.

Michael Tyrone Stokes (“defendant”) appeals from judgment entered after a jury found him to be guilty of felonious fleeing to elude arrest. We find no error.

I. Background

In the early morning hours of 2 September 2000, Greensboro City Police Officer Jeff Mercer (“Officer Mercer”) responded to a call reporting a domestic dispute at an apartment complex. Upon arrival, Officer Mercer began to speak with a black male who was walking away from the residence. As they spoke, defendant approached Officer Mercer and began to interrupt him while holding an object in his hand. Officer Mercer testified defendant was angry and that he believed defendant intended to assault the other individual. Officer Mercer told defendant to “back off” and threatened to use Mace. Defendant complied and walked away toward the apartment.

Defendant’s estranged wife approached Officer Mercer and identified herself as the person who had made the call. As Officer Mercer interviewed defendant’s wife, defendant left the scene in a red pickup truck yelling threats. Officer Mercer contacted Officer T.D. Dell (“Officer Dell”) by radio and requested he intercept defendant at the apartment complex. Officer Dell was unable to intercept defendant there but followed him onto eastbound Interstate 40. The speed limit on Interstate 40 was fifty miles per hour due to a construction zone. Officer Dell estimated defendant was traveling approximately seventy-five miles per hour. Officer Dell activated his lights and siren and initiated a traffic stop. Defendant drove one-half mile before pulling over onto the shoulder.

Officer Dell testified that upon approaching defendant’s vehicle he noticed a strong odor of alcohol, and that defendant’s eyes were very red and glassy. Defendant gave Officer Dell his driver’s license upon request, and Officer Dell returned to his patrol car to wait for other officers to arrive. Once other officers arrived, Officer Dell returned to defendant’s vehicle and asked defendant if he had been drinking. Defendant denied that he had. When Officer Dell asked defendant to step out of his vehicle, defendant put the truck into gear and attempted to leave the scene.

As defendant pulled away, Officer Dell’s hand became pinned inside defendant’s truck. Officer Dell jumped into the cab of the truck through the window. His body armor prevented him from getting the

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lower half of his body into the truck. Defendant began striking Officer Dell to prevent him from reaching the keys. The truck attained a speed of approximately 45 to 50 miles per hour and traveled approximately one-half mile with Officer Dell hanging out of the window. Defendant was “extremely belligerent, shouting “F—k you. F—k you. F—k you. You’re going to die. Get the f—k out of my truck.” Defendant’s demeanor suddenly changed and he said, “It just doesn’t matter. It just doesn’t matter.” At that point, Officer Dell was able to switch off the ignition and the truck coasted to a stop. Officer Dell testified that defendant’s speech was “very thick tongued, mush mouthed, [and] very hard to understand at times.”

When the other officers arrived, defendant again became angry. Three officers forcibly removed him from his truck. Defendant was transported to the Guilford County Detention Center where he was administered a breath analysis examination, which registered a blood alcohol level of .12. Defendant became belligerent and refused a second test.

At trial, defendant admitted to having six or seven beers at a bar prior to the incident. Defendant also admitted that he had violated a protective order by going to his wife’s residence. Defendant moved to dismiss at the close of the State’s evidence and renewed his motion at the close of all evidence. The trial court denied both motions. The jury found defendant to be guilty of felonious fleeing to elude arrest. Defendant pled guilty to having attained habitual felon status and was sentenced to an active term of imprisonment in the mitigated range for a minimum of ninety months and a maximum of 117 months. Defendant appeals.

II. Issues

The issues on appeal are whether: (1) the indictment for felony fleeing to elude arrest was fatally defective; (2) the trial court erroneously instructed the jury on the charge of felony fleeing to elude arrest by failing to define the legal requirements for the element of “gross impairment;” (3) the trial court erroneously instructed the jury on the charge of felony fleeing to elude arrest by instructing the jury on a theory of guilt different from that set forth in the indictment where a fatal variance exists between the allegations in the indictment and the evidence introduced at trial; (4) the trial court erred in denying defendant’s motion to dismiss due to insufficient evidence of speeding and gross impairment; and (5) the trial court improperly commented on the evidence during the jury instructions.

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III. Indictment

[1] Defendant first argues the indictment for felony fleeing to elude arrest was fatally defective because it only references penalty enhancements by name and does not set forth the facts necessary for the jury to find them. We disagree.

N.C. Gen. Stat. § 20-141.5 (2003) is entitled “Speeding to Elude Arrest.” However, except as provided in N.C. Gen. Stat. § 20-141.5(b)(2) below, the statute does not require the State to prove defendant was speeding to be convicted of violating the statute. The statute provides in part:

(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in sub section (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) Speeding in excess of 15 miles per hour over the legal speed limit.

(2) Gross impairment of the person’s faculties while driving due to:

a. Consumption of an impairing substance; or

b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.

(3) Reckless driving as proscribed by G.S. 20-140.

Defendant argues the indictment is fatally defective because the facts necessary to show reckless driving and gross impairment were not set forth in the indictment to elevate the crime from a misdemeanor to a felony. The indictment alleges defendant:

unlawfully, willfully and feloniously did operate a motor vehicle on a highway, Interstate 40, while attempting to elude a law enforcement officer, T.D. Dell of the Greensboro Police Department, in the lawful performance of the officer’s duties,

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stopping the defendant's vehicle for various motor vehicle offenses. At the time of the violation:

1. The defendant was speeding in excess of 15 miles per hour over the legal speed limit.
2. The defendant was driving recklessly in violation of G.S. 20-140.
3. There was gross impairment of the defendant's faculties while driving due to consumption of an impairing substance.

An indictment must charge all the essential elements of the alleged criminal offense. *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147 (2002) (citation omitted). "The elements need only be alleged to the extent that the indictment (1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction." *Id.* at 335, 570 S.E.2d at 147-48 (citing *State v. Baynard*, 79 N.C. App. 559, 562, 339 S.E.2d 810, 812 (1986)). "An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute." *State v. Penley*, 277 N.C. 704, 707-08, 178 S.E.2d 490, 492 (1971) (citations omitted).

The language of the indictment tracks N.C. Gen. Stat. § 20-141.5. Defendant's indictment alleges all of the elements defined by N.C. Gen. Stat. § 20-141.5(a) and the elements necessary to elevate the offense from a misdemeanor to a felony. Our Supreme Court has stated, "the United States Supreme Court has consistently declined to impose a requirement mandating states to prosecute only upon indictments which include all elements of an offense." *State v. Squires*, 357 N.C. 529, 537, 591 S.E.2d 837, 842 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477, 147 L. Ed. 2d 435, 447 (2000); *Alexander v. Louisiana*, 405 U.S. 625, 633, 31 L. Ed. 2d 536, 533-34 (1972)). The indictment is sufficient to charge defendant with felony speeding to elude arrest. This assignment of error is overruled.

IV. Jury Instruction on "Gross Impairment"

[2] Defendant contends the trial court erred by failing to define the legal requirements for the necessary element of "gross impairment" in the jury instructions. We disagree.

Defendant failed to object to the jury instructions at trial and may only assert plain error to the trial court's failure to properly instruct the jury. *See State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378

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(1983); N.C.R. App. P. 10(b)(2) (2004); N.C.R. App. P. 10(c)(4) (2004). Defendant alleges the trial court's failure to properly instruct the jury constitutes plain error. To award a new trial for plain error, the trial court's error must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (citations omitted).

The North Carolina Pattern Jury Instruction for felony speeding to elude arrest reads in pertinent part:

And Fourth, that two or more of the following factors were present at that time:

[(2) gross impairment of the defendant's faculties while driving due to [consumption of an impairing substance] [a blood alcohol level of 0.14 or more within a relevant time after driving]]

[(3) reckless driving as proscribed by G.S. 20-140 . . .]

N.C.P.I.—Crim. 270.54A. The trial court instructed the jury as follows:

And fourth, the State must prove that both of the following factors were present at the time. First, gross impairment of the defendant's faculties while driving due to consumption of an impairing substance and reckless driving. A person operates a vehicle recklessly when he does so carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or when he does so without due caution or circumspection and at a speed or in a manner so as to endanger or to be likely to endanger any person or property.

This Court has found no error where the trial court's instruction "tracked the language of the pattern jury instructions" on the offense of Felony Speeding to Elude Arrest. *State v. Funchess*, 141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000). Here, the trial court followed the pattern jury instructions. No definition of "gross impairment" appears either in the pattern jury instructions or in N.C. Gen. Stat. § 20-141.5(b)(2). We find no past cases defining "gross impairment" in the context of our Speeding to Elude Arrest statute, N.C. Gen. Stat. § 20-141.5.

This Court has discussed gross impairment in the context of a driving while impaired conviction in *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985). In *Harrington*, the defendant was

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convicted of driving while impaired and assigned as error the trial court's finding the defendant was grossly impaired as an aggravating factor. 78 N.C. App. at 41, 336 S.E.2d at 853. We stated, "In construing 'gross impairment,' the intent of the legislature controls; we look first to the plain and ordinary meanings of the words, with an eye to previous enactments and decisions construing similar statutes." *Id.* at 44-45, 336 S.E.2d at 855 (citing *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978)).

"Gross impairment" must be defined with reference to "impairment." "Impairment" does not appear to have any special legal meaning, but simply means "weakening, making worse, diminishment." . . . Under our statutes, the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired. . . . On the other hand, the State need not show that the defendant is "drunk," i.e., that his or her faculties are *materially* impaired. The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired.

Id. at 45, 336 S.E.2d at 855 (internal citations omitted). We noted, "we do not draw a bright line which will mark once and for all where 'impairment' ends and 'gross impairment' begins. That determination must depend on the facts of each individual case." *Id.* at 46-47, 336 S.E.2d at 856. This Court simply stated, "'gross impairment' is a high level of impairment, higher than that impairment which must be shown to prove the offense of DWI." *Id.* at 46, 336 S.E.2d at 856.

"Gross" is defined in numerous terms. The American Heritage Dictionary includes in its definition of "gross" as meaning "glaringly obvious," "flagrant," "utter," and "unmitigated in any way." *The American Heritage Dictionary of the English Language* 798-99 (3rd ed. 1992). Our Supreme Court has stated the court's role in statutory construction as follows:

[T]he function of the court is to discover the intent of the Legislature and to give to the words of the statute the meaning which the Legislature had in mind. Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted.

Transportation Service, Inc. v. County of Robeson, 283 N.C. 494, 499-500, 196 S.E.2d 770, 774 (1973) (internal citations omitted).

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Where the words of a statute have not been given a special or technical meaning, courts are to construe them according to their common and ordinary meaning. *Supply Co. v. Motor Lodge*, 277 N.C. 312, 319, 177 S.E.2d 392, 396 (1970).

Defendant does not contest the meaning of the term “grossly impaired” but asserts error due to those words not being defined for the jury in the jury instructions. The language used in the statute and jury instructions accords with the ordinary meaning of the term “grossly impaired” and is clearly understandable. *State v. McNeely*, 244 N.C. 737, 739-40, 94 S.E.2d 853, 855 (1956) (citation omitted).

In *Funchess*, this Court held that a jury instruction on our Speeding to Elude Arrest Statute was sufficient where it tracked the language of the pattern jury instructions. 141 N.C. App. at 309, 540 S.E.2d at 439. Nothing in the record suggests the Legislature intended for the words “gross impairment” to mean anything other than their common and ordinary meaning. *In re Faulkner*, 38 N.C. App. 222, 224-25, 247 S.E.2d 668, 669-70 (Nothing in the record indicated that the Legislature intended the words “gross incompetence” be given anything other than their common and ordinary meaning.)

The Legislature clearly intended the term “gross impairment” to require a level of impairment higher than that necessary to support a DWI conviction. *Harrington*, 78 N.C. App. at 46, 336 S.E.2d at 856. “In *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984), our Supreme Court noted that there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more.” *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002). Defendant failed to meet his burden of showing that the trial court’s failure to further define “gross impairment” amounted to plain error. This assignment of error is overruled.

V. Variance in the Indictment and Evidence Presented at Trial

[3] Defendant next contends the trial court erred in instructing the jury on a theory of guilt different from that set forth in the indictment. We disagree.

The indictment alleges that defendant attempted to elude a law enforcement officer and that at the time of the violation: (1) he was speeding in excess of fifteen miles per hour over the legal speed limit; (2) he was driving recklessly in violation of N.C. Gen. Stat. § 20-140; and (3) there was gross impairment of defendant’s faculties while

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driving due to the consumption of an impairing substance. While some evidence was presented at trial that defendant was speeding more than fifteen miles per hour over the legal speed limit at the time he attempted to elude the law enforcement officer, the State elected to proceed upon evidence of the two remaining factors—reckless driving and gross impairment. Defendant argues the State must prove all allegations set forth in the indictment, which includes speeding in excess of fifteen miles over the legal speed limit. This argument is without merit.

The facts in this case are similar to those in *Funchess*, 141 N.C. App. 302, 540 S.E.2d 435. In *Funchess*, the State alleged three aggravating factors in the indictment to support the charge of Felony Speeding to Elude Arrest pursuant to N.C. Gen. Stat. § 20-141.5. 141 N.C. App. at 306, 540 S.E.2d at 438. On appeal, the defendant argued the State was required to prove all three factors beyond a reasonable doubt because all were alleged in the indictment. *Id.* at 310, 540 S.E.2d at 440. This Court, relying on *State v. Moore*, 315 N.C. 738, 340 S.E.2d 401 (1986), found no error and held the plain language of the statute only required proof of two or more of the factors to support a felony conviction. *Id.* Here, the State's evidence supported the charges of defendant's reckless driving and gross impairment of defendant's faculties set forth in the indictment. This assignment of error is overruled.

VI. Motions to Dismiss

[4] Defendant argues the trial court erred in denying defendant's motions to dismiss at the close of the State's evidence and at the close of all evidence because insufficient evidence of speeding and gross impairment was presented at trial. We disagree.

The lack of evidence or the State's abandonment of speeding in excess of fifteen miles per hour over the legal speed limit as an aggravating factor did not constitute error. The State was only required to prove two of the three factors listed in the indictment to elevate the crime from a misdemeanor to a felony. N.C. Gen. Stat. § 20-141.5. The sole issue in this assignment of error is whether substantial evidence was presented to support a conclusion that defendant's faculties were grossly impaired while driving due to the consumption of an impairing substance.

When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential

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element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). The trial court “must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences . . . Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citation omitted).

Defendant contends the trial court should have dismissed the charges because the evidence at trial only showed “appreciable impairment” rather than “gross impairment.” The State presented evidence tending to show: (1) defendant had a strong odor of alcohol about him; (2) defendant’s eyes were “very red, glazed, [and] glassy;” (3) defendant’s speech was “mush mouthed” and “very hard to understand;” (4) defendant repeatedly used profanity against the officers; (5) defendant told Officer Dell that he was “going to die;” (6) defendant drove one-half mile with the lower portion of Officer Dell’s body hanging out of the window of his vehicle; (7) defendant had to be forcibly removed from his vehicle; and (8) defendant testified that he consumed six to seven beers at a local bar between 9:30 p.m. and 1:00 a.m. and admitted he was under the influence of alcohol when he pulled off from the traffic stop. Sufficient evidence was presented to support a conclusion by the jury that defendant was grossly impaired. This assignment of error is overruled.

VII. Comment on the Evidence

[5] Defendant contends the trial court improperly commented on the evidence during the jury instructions. The court instructed the jury that “arresting a person for driving while impaired is a duty of a Greensboro police officer” when there was no evidence defendant was arrested or charged with driving while impaired. We disagree.

N.C. Gen. Stat. § 15A-1222 (2003) prohibits a trial judge from expressing any opinion in the presence of the jury on any question of fact. “It is fundamental to our system of justice that each and every person charged with a crime be afforded the opportunity to be tried

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'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.' " *State v. Harris*, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). "The charge, however, must be viewed contextually, and whether a defendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice." *State v. Lofton*, 66 N.C. App. 79, 84-85, 310 S.E.2d 633, 636-37 (1984) (citations omitted). "If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (citations omitted).

The trial court made the statements defendant challenges within its recitation of the jury instruction on the charge of Assault with a Deadly Weapon on a Government Officer. The trial court instructed the jury as follows:

Third, that the victim was an officer of a political subdivision of the State. A Greensboro police officer is an officer of a political subdivision of the State. And fourth, that the victim was performing a duty of his office. Arresting a person for driving while impaired is a duty of a Greensboro police officer.

The trial court was explaining to the jury that the victim of the assault must have been an "officer of a political subdivision of the State" who was "performing a duty of his office." At the time of the alleged offense, Officer Dell was investigating a possible driving while intoxicated offense. Defendant smelled of alcohol and his eyes were red and glassy. The trial court charged that Officer Dell was discharging a duty of his office at the time of the alleged assault and was not commenting on the evidence. This assignment of error is overruled.

VIII. Conclusion

Defendant's indictment for felony fleeing to elude arrest was not fatally defective. Defendant has failed to show plain error by the trial court in following the pattern jury instructions and the language of the statute without specifically defining "gross impairment" or in instructing the jury on a theory of guilt different from that set forth in the indictment.

The trial court did not err in denying defendant's motions to dismiss and did not improperly comment on the evidence to the jury.

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Defendant received a fair trial, free from errors he preserved, assigned, and argued.

No error.

Judges JACKSON and JOHN concur.

STATE OF NORTH CAROLINA v. ALONZO PRESTON DENT

No. COA05-60

(Filed 15 November 2005)

1. Constitutional Law— effective assistance of counsel— failure to move to suppress inculpatory statement and evidence

Defendant did not receive ineffective assistance of counsel in a possession of a controlled substance on the premises of a local confinement facility case based on his counsel's failure to move to suppress his inculpatory statement to law enforcement officers as well as the evidence seized during the search of his person, because: (1) there was no meritorious basis to support suppression of defendant's statements or the marijuana found on his person; (2) the officers' comments qualify as those normally attendant to arrest and custody, and are thus not considered as questions or interrogation for purposes of Miranda; and (3) defendant is unable to demonstrate a reasonable probability that but for his counsel's failure to move to suppress the evidence, the result of the proceeding would have been different.

2. Drugs— possession of marijuana—premises of local confinement facility—secured search area

The trial court properly denied defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility in violation of N.C.G.S. § 90-95(e)(9) where the evidence tended to show that defendant possessed marijuana in a secured area of the Forsyth County Law Enforcement and Detention Center provided for the detention and search of individuals awaiting an appearance before the magistrate.

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3. Drugs— instructions—local confinement facility

The trial court did not commit plain error in a possession of a controlled substance on the premises of a local confinement facility case by instructing the jury that the Forsyth County Law Enforcement and Detention Center is a local confinement facility, because: (1) the county law enforcement and detention center is a multiple-use building which includes, among other things, a jail, the sheriff's office, and the magistrate's office; (2) officers discovered marijuana on defendant's person not while he was in the magistrate's office, but while he was in a secured area of the center provided for the detention and search of individuals awaiting appearance before the magistrate; (3) the determination of whether this area was on the premises of a local confinement facility involved the interpretation of the bounds of a statute, which is a question of law for the trial court, not a question of fact for the jury; and (4) the trial court made a proper determination regarding the applicability of N.C.G.S. § 90-95(e)(9) to the facts of this case.

Appeal by defendant from judgment entered 19 August 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 22 September 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

SMITH, Judge.

Alonzo Preston Dent ("defendant") appeals his convictions for possession of a controlled substance on the premises of a local confinement facility and obtaining habitual felon status. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error.

At trial, the State's evidence tended to show the following: On 7 August 2003, Winston-Salem Police Department Officer E.D. Bradshaw ("Officer Bradshaw") noticed defendant driving a vehicle in the Washington Park neighborhood of Winston-Salem, North Carolina. Believing defendant's driving privileges were revoked, Officer Bradshaw stopped defendant's vehicle and requested defendant to provide a valid driver's license and vehicle registration.

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Although defendant provided valid registration for the vehicle, he admitted he did not have a driver's license or driving privileges in North Carolina. Officer Bradshaw then arrested defendant for driving while license revoked. While searching defendant, Officer Bradshaw noticed the smell of "burnt marijuana about [defendant's] person[.]" He also found approximately \$800.00 in cash and an unwrapped cigar in defendant's pockets. Officer Bradshaw did not find any marijuana on defendant's person during the search. When Officer Bradshaw asked defendant "several times" whether "he had any marijuana," defendant answered negatively.

Defendant was transported to the Forsyth County Law Enforcement and Detention Center. Prior to entering the building, Officer Bradshaw again asked defendant whether he was in possession of any controlled substances. Defendant replied he was not, and he was taken inside the building. After entering the lobby of the magistrate's office, Officer Bradshaw and Winston-Salem Police Department Officer L.T. Patterson ("Officer Patterson") took defendant into a nearby search room. Once inside the search room, Officer Bradshaw informed defendant that he would be "strip searched." Defendant then stated that he had "residue" in his right sock. When the officers removed defendant's sock, they found approximately 1.1 grams of marijuana inside.

Defendant was subsequently indicted for possession of a controlled substance on the premises of a local confinement facility and obtaining habitual felon status. Prior to trial, defendant filed a motion to dismiss the possession charge, arguing that the term "local confinement facility" did not encompass the search room or lobby of the magistrate's office. The trial court denied defendant's motion, and the case proceeded to trial on 18 August 2004. On 19 August 2004, the jury found defendant guilty of possession of a controlled substance on the premises of a local confinement facility. Defendant thereafter pled guilty to obtaining habitual felon status. After concluding defendant had six prior record points and a prior felony record III, the trial court sentenced defendant to a total of seventy to ninety-three months imprisonment. Defendant appeals.

The issues on appeal are whether: (I) defendant received ineffective assistance of counsel at trial; (II) the trial court erred by denying defendant's motion to dismiss; and (III) the trial court erred in instructing the jury.

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[1] Defendant first argues that he received ineffective assistance of counsel at trial. Defendant asserts he is entitled to a new trial because his trial counsel failed to move to suppress his inculpatory statement to law enforcement officers as well as the evidence seized during the search of his person. We disagree.

“When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel’s conduct fell below an objective standard of reasonableness.” *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). To establish ineffective assistance of counsel, a defendant must satisfy the following two-part test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). When reviewing an ineffective assistance of counsel claim, our appellate courts “engage[] in a presumption that [the] trial counsel’s representation [wa]s within the boundaries of acceptable professional conduct.” *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). “The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.” *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. “Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *Id.* at 563, 324 S.E.2d at 249. In the instant case, because we conclude there was no meritorious basis to support suppression of defendant’s statements or the marijuana found on his person, we conclude defendant’s trial counsel did not provide ineffective assistance by failing to move to suppress the evidence.

The record reflects that immediately prior to being strip searched, defendant informed the officers that he had “residue” in his

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right sock. Defendant contends that this inculpatory statement as well as the evidence seized pursuant to it were inadmissible at trial because they were a product of “custodial interrogation” held without first advising him of his *Miranda* rights. We do not agree.

In *State v. Phelps*, the defendant was arrested on two outstanding warrants and transported to “the county jail.” 156 N.C. App. 119, 121, 575 S.E.2d 818, 820 (2003). Although no contraband was found during a search incident to his arrest, on the way to the jail a law enforcement officer “explained to [the defendant] that he needed to let [the officer] know . . . before [they] went past the jail doors if he had any kind of illegal substances or weapons on him, that it was an automatic felony no matter what it was . . .” *Id.* The defendant thereafter confessed to possession of cocaine. Both the law enforcement officer’s comments and the defendant’s inculpatory statement were made prior to the defendant being advised of his *Miranda* rights. On appeal, it was determined that the officer “knew or should have known that his statement was reasonably likely to evoke an incriminating response” from the defendant, and thus the defendant’s *Miranda* rights were violated. *Id.* at 123, 575 S.E.2d at 821. However, with respect to the cocaine seized following the “interrogation,” it was held that because the defendant’s statement was not a product of coercion, evidence seized subsequently and pursuant to the statement was admissible and would not qualify as “fruit of the poisonous tree.” *Id.* at 124-26, 575 S.E.2d at 822-23. We concluded that “even if a *Miranda* violation had occurred, the crack cocaine was . . . admissible.” *Id.* at 126, 575 S.E.2d at 823.¹

As in *Phelps*, the transcript in the instant case reflects that, while in custody but prior to being advised of his *Miranda* rights, defendant was told several times that discovery of any controlled substance on his person after he arrived at the Forsyth County Law Enforcement and Detention Center would result in a felony charge. However, unlike in *Phelps*, defendant made no incriminating statement in re-

1. Although he concurred in this determination as well as the determination regarding the violation of the defendant’s *Miranda* rights, Judge Hunter argued in dissent that the *Phelps* majority was incorrect in concluding that the trial court’s erroneous admission of the defendant’s incriminating statement was harmless beyond a reasonable doubt and that the controlled substance was also admissible under the inevitable discovery doctrine. 156 N.C. App. at 127-28, 575 S.E.2d at 823-25. On review, our Supreme Court agreed with Judge Hunter, reversing *per curiam* the majority’s decision “[f]or the reasons stated in the dissenting opinion[.]” *State v. Phelps*, 358 N.C. 142, 592 S.E.2d 687 (2004). Therefore, our reliance on *Phelps* is limited to those conclusions reached by the entire panel as well as Judge Hunter’s determinations regarding the prejudicial impact of the evidence.

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sponse to these custodial statements. Instead, defendant made his incriminating statement after he arrived at the Detention Center and just prior to being strip searched.

When examining the circumstances surrounding an alleged custodial interrogation, courts focus on the suspect's perceptions rather than the intent of law enforcement officers. *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Generally, "[t]he term 'interrogation' is not limited to express questioning by law enforcement officers, but also includes 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199 (quoting *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308). "However, because 'the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.'" *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199 (quoting *Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308)) (emphasis in original).

In the case *sub judice*, after being asked to explain "what happened inside the search room[,]" Officer Bradshaw testified as follows:

After I informed [defendant] that we were going to be completing a strip search of him inside the search room, myself and, at the time, Corporal Patterson, [defendant] advised me that he had some, quote, residue in his right sock.

As detailed above, defendant had rebuffed several prior attempts by the law enforcement officers to elicit information regarding defendant's possession of a controlled substance. At the time defendant made his statement, the officers were merely informing him of the extent of their then-impending search. There is no indication that the officers' comments at that time "were . . . intended nor reasonably expected to elicit an incriminating response from defendant." *State v. Vick*, 341 N.C. 569, 581, 461 S.E.2d 655, 662 (1995) (concluding that police captain's statements during fingerprinting that he would talk with the defendant later and answer any of the defendant's questions at that time were not intended or expected to elicit an incriminating response). Instead, we conclude that the officers' comments qualify

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as those “normally attendant to arrest and custody,” and are thus not considered as questions or interrogation for purposes of *Miranda*. See *Innis*, 446 U.S. at 300-02, 64 L. Ed. 2d at 307-08 (concluding that “[i]nterrogation,” as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself[.]” and that “the term ‘interrogation’ under *Miranda*” does not extend to “words or actions on the part of the police . . . normally attendant to arrest and custody”). Therefore, any incriminating statement made by defendant and any evidence seized following these comments were properly admissible at trial. In light of the foregoing, and because defendant is unable to demonstrate a “reasonable probability that, but for [his] counsel’s [failure to move to suppress the evidence], the result of the proceeding would have been different[.]” *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, we hold that defendant did not receive ineffective assistance of counsel at trial. Accordingly, we reject defendant’s first argument.

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of possession of a controlled substance on the premises of a local confinement facility. Although he concedes that the magistrate’s office, its lobby, and its search rooms are each located inside the Forsyth County Law Enforcement and Detention Center, defendant contends that the legislature did not intend N.C. Gen. Stat. § 90-95(e)(9) to apply in these areas. We disagree.

N.C. Gen. Stat. § 90-95(e)(9) (2003) provides that “[a]ny person who [possesses a controlled substance] on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony.” In support of his contention, defendant notes that while N.C. Gen. Stat. § 90-95(e)(9) does not define the term “local confinement facility,” N.C. Gen. Stat. § 153A-217 (2003) provides the following definition for the term:

“Local confinement facility” includes a county or city jail, a local lockup, a regional or district jail, a juvenile detention facility, a detention facility for adults operated by a local government, and any other facility operated by a local government for confinement of persons awaiting trial or serving sentences

Thus, defendant asserts that because the magistrate is an officer of the district court and the magistrate’s office is separate from “the actual housing where the inmates would be sleeping and conducting their daily activities,” reading N.C. Gen. Stat. § 90-95(e)(9) to include

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the area at issue leads to an absurd result not contemplated by the legislature. We do not agree.

It is well established that the “primary endeavor” of statutory interpretation is to give effect to the legislature’s intent. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005). Where a statute’s language is clear and unambiguous, the court should give its words their plain and definite meaning. *Id.* at 614, 614 S.E.2d at 277. However, where a statute is ambiguous, courts will construe the statute to “ascertain the legislative will[,]” mindful that “where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *Id.* (citations and quotation marks omitted).

Although we note that other statutes prohibit certain actions by individuals in “the custody of any” local confinement facility, *see, e.g.*, N.C. Gen. Stat. § 14-258.2 (prohibiting the possession of a dangerous weapon by “any person under the custody of any local confinement facility as defined in G.S. 153A-217”), N.C. Gen. Stat. § 14-258.3 (prohibiting the taking, holding, or carrying away of any hostages by “any person in the custody of any local confinement facility (as defined by G.S. 153A-217)”), and N.C. Gen. Stat. § 14-258.4 (prohibiting the wilful throwing, emitting, or projecting of bodily fluids or excrement at any person who is an employee of the State or a local government by “[a]ny person in the custody of . . . any local confinement facility (as defined in G.S. 153A-217, or G.S. 153A-230.1)”), we also note that, by its plain language, N.C. Gen. Stat. § 90-95(e)(9) is not restricted solely to those individuals in custody of a local confinement facility or those actions occurring at a particular section of the facility. Instead, unlike N.C. Gen. Stat. §§ 14-258.2, 14-258.3, and 14-258.4, N.C. Gen. Stat. § 90-95(e)(9) clearly extends to “any person” possessing a controlled substance at a local confinement facility, and the scope of its coverage expressly includes the “premises” of such facilities.

Black’s Law Dictionary notes that “premises” is “an elastic and inclusive term” when used to refer to “estates and property,” in that “it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent on the circumstances in which used[.]” (6th ed. 1990). In the context of criminal law, “[t]he term as used in a search warrant includes land, buildings, and appurtenances thereto.” *Id.* In the case at bar, testimony at trial tended to

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show that, in order to enter the area of the Forsyth County Law Enforcement and Detention Center at issue, law enforcement officers must first proceed through a locked vehicle gate and then check their weapons and identify themselves via an intercom system. The secured lobby of the facility contains three temporary “holding cells,” as well as access to the area where jail personnel and more permanent cells are located. Only law enforcement officers and those individuals in custody or under “special arrangements” are allowed to enter the area. While the room in which defendant was searched is “just on the other side of the door” allowing entry into the magistrate’s lobby, it is nevertheless a secured room where law enforcement officers detain and search those individuals who are to be taken before the magistrate.

Our Supreme Court has consistently held that criminal statutes are generally construed narrowly against the State and in favor of the accused. *See, e.g., State v. Hearst*, 356 N.C. 132, 136, 567 S.E.2d 124, 128 (2002). However, this rule is not violated “‘by permitting the words of [a] statute to have their full meaning, or the more extended of two meanings, . . . but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.’” *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489-90 (1987) (quoting *United States v. Hartwell*, 73 U.S. 385, 396, 18 L. Ed. 830, 833 (1868)). Thus, “[t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the ‘narrowest meaning’; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.” *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948).

In light of the foregoing, and giving the word “premises” in N.C. Gen. Stat. § 90-95(e)(9) its plain meaning, we conclude that the legislature intended to cover that portion of the Forsyth County Law Enforcement and Detention Center at issue in the instant case. The legislative intent in making possession of a controlled substance on the premises of a local confinement facility felonious is clear: to deter and prevent drug possession among those individuals present at local confinement facilities. By including the term “on the premises of” in its description of the restricted area, the legislature plainly intended that N.C. Gen. Stat. § 90-95(e)(9) should extend beyond the bounds of the “lockup” area of a local confinement facility, including to those secured areas in which arrestees are temporarily detained for search,

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booking, and other purposes. Therefore, the trial court did not err by denying defendant's motion to dismiss the charge of possession of a controlled substance on the premises of a local confinement facility. Accordingly, we reject defendant's second argument.

[3] Defendant next argues the trial court erred in its jury instructions. Although defendant concedes he failed to object to this alleged error at trial, he now asserts the trial court committed plain error by instructing the jury that "[t]he Forsyth County Detention Center is a local confinement facility." We disagree.

"A prerequisite to [an appellate court's] engaging in a 'plain error' analysis is the determination that the instruction constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Once we have determined that the trial court erred, " 'before deciding that an error by the trial court amounts to "plain error," [we] must be convinced that absent the error the jury probably would have reached a different verdict.' " *Id.* (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

In the case *sub judice*, defendant contends that the trial court's instruction preempted the jury's determination and that "[t]he real question needing to be decided by the jury was not whether the Forsyth County Detention Center was a local confinement facility, but rather, whether the *magistrate's office* where [defendant] was searched and the marijuana was found, located in the Forsyth County Detention Center, was a local confinement facility." However, we believe defendant mischaracterizes the facts of this case. The Forsyth County Law Enforcement and Detention Center is a multiple-use building which includes, among other things, a jail, the sheriff's office, and the magistrate's office. As discussed above, law enforcement officers discovered marijuana on defendant's person not while he was in the magistrate's office, but while he was in a secured area of the Forsyth County Law Enforcement and Detention Center provided for the detention and search of individuals awaiting appearance before the magistrate. The determination of whether this area was "on the premises of a local confinement facility" involved the interpretation of the bounds of a statute, which is a question of law for the trial court, not a question of fact for the jury. As the trial court made a proper determination regarding the applicability of N.C. Gen. Stat. § 90-95(e)(9) to the facts of the instant case, we conclude the trial court did not err in instructing the jury. Therefore, we reject defendant's final argument.

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In light of the foregoing, we hold that defendant received a trial free of prejudicial error.

No error.

Judges HUDSON and ELMORE concur.

CHARLES HALEY, EMPLOYEE-PLAINTIFF v. ABB, INC., DEFENDANT-EMPLOYER, SELF
INSURED (GALLAGHER BASSETT SERVICES, INC., SERVICING AGENT)

No. COA05-343

(Filed 15 November 2005)

**1. Workers' Compensation— sanctions and attorney fees—
refusal to reinstate compensation and denial of psycholog-
ical treatment**

The Industrial Commission properly awarded sanctions and attorney fees to a workers' compensation plaintiff based upon defendant's refusal to comply with an order to reinstate compensation and its denial of psychological treatment.

**2. Workers' Compensation— compensation prior to second
evaluation—back condition as result of leg injury—evi-
dence sufficient**

The Industrial Commission did not err by awarding workers' compensation prior to a second medical evaluation where defendant chose the treating doctor that gave plaintiff the disability rating. Further, there was credible evidence supporting the Commission's finding that plaintiff's back condition was a natural and probable result of his compensable leg injury.

**3. Workers' Compensation— average weekly wage—Commis-
sion's determination—sufficiency of evidence**

There was competent evidence in a workers' compensation case to support the Industrial Commission's determination of plaintiff's average weekly wage which included an amount for overtime.

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4. Workers' Compensation— vocational rehabilitation—release by treating physicians required

The Industrial Commission did not abuse its discretion in a workers' compensation case by denying defendant's request for vocational rehabilitation until plaintiff is released by his treating physicians.

Appeal by defendant from an Opinion and Award entered 4 November 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 October 2005.

The Deuterman Law Group, PA, by Daniel L. Deuterman and Joel W. Davis, for plaintiff-appellee.

McGuireWoods, LLP, by Steven T. Ackermann, for defendant-appellant.

BRYANT, Judge.

ABB, Inc. (defendant) appeals an Opinion and Award entered 4 November 2004 by the North Carolina Industrial Commission (Full Commission) awarding Charles Haley (plaintiff) temporary total disability compensation, temporary partial disability compensation and medical expenses incurred for the treatment of plaintiff's disability; and ordering defendant to pay plaintiff's attorney's fees and a sanction of \$1,000.00 for failure to comply with the Workers' Compensation Rules.

Facts and Procedural History

On 29 January 2001 plaintiff sustained a compensable injury by accident to his right knee when he slipped off a pallet while working as a stock room attendant/receiving clerk for defendant. Defendant accepted liability for plaintiff's right knee injury by filing a Form 60 on 30 March 2001, wherein the carrier agreed to make temporary total disability payments based on the average weekly wage of \$533.20, which yields a weekly compensation rate of \$355.48. On 10 April 2001, defendant filed an amended Form 60 listing an average weekly wage for plaintiff of \$1,097.44 which yields the maximum compensation rate for 2001 of \$620.00 per week.

Plaintiff was initially treated by Dr. Robert Wainer, an orthopaedic surgeon. On 16 March 2001, Dr. Wainer performed knee surgery on plaintiff. Thereafter, plaintiff's condition deteriorated and he was subsequently diagnosed by Dr. Wainer as having developed

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reflex sympathetic dystrophy (RSD). Dr. Wainer referred plaintiff to Dr. Lewis A. Koman at North Carolina Baptist Hospital for treatment of his RSD.

Plaintiff underwent several diagnostic exams to determine the extent of his complex regional pain syndrome (CRPS), also referred to as RSD. The results of the diagnostic exams indicated plaintiff had an abnormal pain reaction and plaintiff was diagnosed by Dr. Koman as suffering from severe arthrofibrosis, or scar tissue in the knee joint, and CRPS in the right leg, secondary to the admittedly compensable knee injury of 29 January 2001. CRPS or RSD is a syndrome that includes pain which is usually out of proportion to the injury and includes autonomic dysfunction and functional impairment.

On 31 October 2001, plaintiff underwent a repeat arthroscopy performed by Dr. Gary Poehling. The second arthroscopy revealed very severe arthrofibrosis in plaintiff's right knee, which Dr. Koman felt was directly related in part to the severity of plaintiff's injury. Although the arthroscopy of 31 October 2001 restored some range of motion to plaintiff's leg, plaintiff continued to experience severe and disabling symptoms of CRPS. Plaintiff did not regain functional use of his right leg and remained on crutches.

On 16 January 2002, Dr. Koman found plaintiff unable to work and referred him for pain management. On 21 January 2002, Dr. Koman released plaintiff to sedentary work, restricted to sitting. Plaintiff was allowed to work half days for two weeks, for six hours per day in the third week, and full time in the fourth week.

Plaintiff returned to work with defendant on 26 January 2002 in a created shipping clerk position. This position normally required a worker to load trucks, attach labels and complete paperwork. However, in order to adhere to plaintiff's restrictions, plaintiff was only required to complete paperwork.

Dr. Koman continued to treat plaintiff and on 24 April 2002 Dr. Koman found plaintiff needed additional sympathetic block injections and referred plaintiff to a psychologist. On 24 May 2002 plaintiff was first examined by psychologist Dr. Timothy N. Webster. Dr. Webster initially evaluated plaintiff to determine whether or not plaintiff was a candidate for a spinal cord stimulator. Dr. Webster diagnosed plaintiff with major depression secondary to chronic pain and situational stressors. Dr. Webster found plaintiff to have no significant psychiatric history and found plaintiff to be credible based upon the testing he administered.

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On 10 July 2002, Dr. Koman noted he did not feel plaintiff needed to remain sedentary, but felt plaintiff required a job that would accommodate his continued use of crutches. Dr. Koman did not feel plaintiff needed additional therapy, but felt plaintiff's continuing symptoms of pain needed to be addressed. On 8 August 2002, plaintiff was seen by psychiatrist Dr. Henry E. Branham. Dr. Branham diagnosed plaintiff with major depression, single episode, non-psychotic, secondary to chronic pain syndrome and RSD. A spinal cord stimulator was surgically installed by Dr. Stuart Meloy of Piedmont Pain Management in December 2002. The trial of the spinal cord stimulator was not successful and plaintiff was left with severe back pain at the site of the insertion of the device into his spinal cord.

In August of 2003 plaintiff was referred to Dr. Henry Ezell Branham, Jr. for a psychiatric evaluation. On 24 January 2003, Dr. Branham evaluated plaintiff and found plaintiff to be so profoundly depressed and suicidal that Dr. Branham wrote plaintiff out of work indefinitely. After receiving Dr. Branham's report Jean Bassett, defendant's rehabilitation nurse overseeing plaintiff's case, referred plaintiff to Dr. Webster for psychological counseling. Dr. Webster saw plaintiff on 31 January 2003, at which time he found plaintiff's depression was considerably worse and plaintiff was having suicidal thoughts. Dr. Webster found plaintiff's depression to be disabling.

On 20 February 2003, plaintiff was given a functional capacity evaluation and found to be capable of sedentary work for eight hours a day. Dr. Koman last saw plaintiff on 26 February 2003, at which time Dr. Koman assigned a 100% permanent impairment rating to plaintiff's right leg. Dr. Koman also placed plaintiff on permanent restrictions that included sedentary work only, lifting ten pounds maximum, and limited walking and standing with crutches only. Dr. Koman attributed the rating and restrictions to the limitation of motion in plaintiff's knee, the swelling, the previous surgeries, the decreased function, and plaintiff's inability to walk. Dr. Koman causally related the rating and restrictions to plaintiff's compensable injury of 29 January 2001. Dr. Koman released plaintiff to further care with pain management professionals and continued psychiatric treatment.

The Full Commission found that, as the result of the compensable injury by accident, plaintiff was totally disabled and unable to work in any employment from 18 March 2001 until he returned to work on 26 January 2002. Upon his return to work, plaintiff earned diminished wages and was paid temporary partial disability benefits from 26 January 2002 through 30 June 2002, in varying amounts equal to two-

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thirds of the difference between plaintiff's average weekly wage of \$1,097.40 and his actual earnings.

The Full Commission also found that defendant unilaterally and without explanation decided to terminate plaintiff's temporary partial disability benefits without seeking or receiving approval of the Commission. On 17 October 2002, the Commission issued an Order requiring defendant to pay plaintiff temporary partial disability, subject to a 10% penalty for all payments more than 14 days past due. Defendant did not timely file an appeal of this Order. At the time of the 30 April 2003 hearing before Deputy Commissioner Glenn, defendant had not made any additional temporary partial disability payments to plaintiff and had failed to comply with the Commission's Order of 17 October 2002.

As a result of the termination of plaintiff's benefits, plaintiff suffered financial hardship. The Full Commission found plaintiff's financial problems after April 2002 were the direct result of defendant's decision to terminate plaintiff's temporary partial disability benefits without approval of the Commission. Plaintiff's financial problems compounded and aggravated his depression resulting from the pain and disability of his compensable knee injury of 29 January 2001.

Plaintiff has remained out of work since 24 January 2003 under Dr. Branham's orders. The Full Commission found plaintiff has not reached maximum medical improvement and since 24 January 2003 has continued to be unable to work due to his disabling depression and the physical pain and disability caused by his admittedly compensable injury of 29 January 2001. The Full Commission found, based on the greater weight of the credible evidence, that plaintiff's depression and other psychological conditions are the proximate result of the pain associated with his compensable knee injury of 29 January 2001.

The Full Commission further found that plaintiff's back condition resulted from the implantation of the spinal cord stimulator and was a natural and probable result of the compensable injury by accident and resulting pain. The Full Commission awarded plaintiff temporary total disability compensation, temporary partial disability compensation, compensation for medical expenses incurred for the treatment of his disability, and ordered defendant to pay plaintiff's attorney's fees and a sanction of \$1,000.00 for failure to comply with the Workers' Compensation Rules. Defendant appeals.

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Defendant raises four issues on appeal: (I) whether the Full Commission erred in assessing sanctions and attorney's fees against defendant; (II) whether the Full Commission erred in awarding plaintiff compensation for his back and leg injuries prior to a second opinion evaluation; (III) whether the Full Commission accurately determined plaintiff's average weekly wage; and (IV) whether the Full Commission erred in finding defendant is not entitled to initiate vocational rehabilitation. For the following reasons, we affirm the Opinion and Award of the Full Commission.

Standard of Review

Review by this Court of a decision by the North Carolina Industrial Commission is limited to the determination of "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). We note at the outset that defendant has failed to specifically assign error to each finding of fact it contends is not supported by competent evidence. Defendant merely asserts "[t]he Deputy Commissioner's and Full Commission's findings of fact and conclusions of law were unsupported by the evidence and/or contrary to the Workers' Compensation Act, N.C. Gen. Stat. Section 91-1 et seq." "[F]indings of fact to which [an appellant] has not assigned error and argued in his brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). Furthermore, our "[a]ppellate review depends on specific exceptions and proper assignments of error presented in the record on appeal. The assignment of error must clearly disclose the question presented. A single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact . . . is broadside and ineffective." *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985) (internal citations omitted); *see also*, N.C. R. App. P. 10. Therefore, the Full Commission's specific findings of fact are binding on appeal. However, the Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

Finally, we note, in his brief, plaintiff moves this Court to dismiss defendant's appeal. "Motions to an appellate court may not be made in a brief but must be made in accordance with N.C. R. App. P. 37." *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d

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856, 858 (1996). We will limit our review only to those issues properly preserved by the parties.

I

[1] Defendant first claims the Full Commission erred in assessing sanctions and attorney's fees against defendant. Under Section 97-88.1 of the North Carolina General Statutes the Industrial Commission may assess "the whole cost of the proceedings including reasonable [attorney's fees]" if the Commission determines "any hearing has been brought, prosecuted or defended without reasonable ground." N.C. Gen. Stat. § 97-88.1 (2003); *see also*, *Hieb v. Howell's Child Care Ctr., Inc.*, 123 N.C. App. 61, 472 S.E.2d 208 (1996) (where the Full Commission properly awarded attorney's fees upon finding defendants in violation of Industrial Commission rules by terminating compensation without the Commission's approval, and by refusing to resume immediate payments following the Deputy Commissioner's order). The Commission may also assess a penalty of 10% of any "installment not paid within 14 days after it becomes due." N.C. Gen. Stat. § 97-18(g) (2003). Furthermore, Rule 802 of the Workers' Compensation Rules of the North Carolina Industrial Commission permits the Commission to impose fees and sanctions upon a party that fails to comply with the Commission's rules or fails to timely file required forms. Workers' Comp. R. of N.C. Indus. Comm'n 802, 2005 Ann. R. (N.C.) 919, 945-46; *see also*, *Joyner v. Mabrey Smith Motor Co.*, 161 N.C. App. 125, 587 S.E.2d 451 (2003) (where the Full Commission properly imposed sanctions under Rule 802 when the defendant failed to answer interrogatories within the appropriate time period and failed to request any extension of time).

The Full Commission awarded plaintiff attorney's fees of 25% of the past due temporary partial disability compensation; a late payment penalty of 10% on all past due temporary partial or total disability compensation; a sanction of \$1,000.00 for failure to comply with the Workers' Compensation Rules by stopping plaintiff's temporary partial disability compensation without Commission approval; and attorney's fees of 25% of all compensation payable to plaintiff. The Full Commission made the following pertinent findings of fact which are based on competent evidence and therefore binding on appeal:

41. On or about June 30, 2002, defendant unilaterally and without explanation decided to terminate plaintiff's temporary partial dis-

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ability benefits. Defendant did not seek or receive Commission approval before terminating plaintiff's benefits.

42. As a result of the termination of plaintiff's benefits, plaintiff suffered financial hardship. . . . Plaintiff's financial problems compounded and aggravated plaintiff's depression resulting from the pain and disability of his compensable knee injury of January 29, 2001.

43. From the period of April 28, 2002 through the date of the hearing before the Deputy Commissioner, plaintiff received only three temporary partial disability payments, requiring plaintiff's counsel to request an order from the Commission requiring defendant to make regular payments.

44. On October 17, 2002, the Commission issued an Order requiring defendant to pay plaintiff temporary partial disability, subject to a 10% penalty for all payments more than 14 days past due. Defendant did not timely file an appeal of this Order.

45. At the time of the hearing before Deputy Commissioner Glenn, defendant had not made any additional temporary partial disability payments to plaintiff and failed to comply with the Commission's Order of October 17, 2002.

The Full Commission concluded "[d]efendant's refusal to comply with the Commission's Order of October 17, 2002 to reinstate temporary partial disability compensation and defendant's denial of psychological treatment were made without any reasonable basis." The Full Commission's conclusion that defendant's refusal to comply with the Commission's order and its denial of psychological treatment was without reasonable grounds and based on unfounded litigiousness was based on sufficient evidence such that its decision to award reasonable attorney's fees was appropriate. *See Hieb*, 123 N.C. App. at 69, 472 S.E.2d at 213. This assignment of error is overruled.

II

[2] Defendant next claims the Full Commission erred in awarding plaintiff compensation for his back and leg injuries prior to its guaranteed second opinion evaluation. Defendant argues it is statutorily entitled to a second opinion regarding plaintiff's permanent partial disability rating under Section 97-27(a) of the North Carolina General Statutes. Defendant requested an independent medical examination at the hearing before Deputy Commissioner Glenn to obtain a second opinion which was denied.

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N.C. Gen. Stat. § 97-27 states:

(a) After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall, subject to the provisions of subsection (b), submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. . . .

(b) In those cases arising under this Article in which there is a question as to the percentage of permanent disability suffered by an employee, if any employee, required to submit to a physical examination under the provisions of subsection (a) is dissatisfied with such examination or the report thereof, he shall be entitled to have another examination by a duly qualified physician or surgeon

N.C.G.S. § 97-27 (2003). “The language of the statute, however, imposes no mandatory obligation on the Industrial Commission to order an examination. When an employee [sic] requests the Commission to order an employee to submit to an examination, whether the Commission grants or denies the employer’s request is within the discretion of the Commission.” *Taylor v. M. L. Hatcher Pick-Up & Delivery Serv.*, 45 N.C. App. 682, 684-85, 263 S.E.2d 788, 790 (1980). Defendant chose plaintiff’s treating doctor that gave him the disability rating for his right leg. Defendant has shown no abuse of discretion by the Deputy Commissioner in finding that defendant was not entitled to an independent medical evaluation for plaintiff’s leg injury. Furthermore, the Full Commission found, based on credible evidence, that plaintiff’s back condition resulted from the implantation of the spinal cord stimulator and was a natural and probable result of the compensable injury by accident and resulting pain. Therefore the Full Commission did not err in affirming the Deputy Commissioner’s findings and awarding plaintiff compensation for his back and leg injuries. This assignment of error is overruled.

III

[3] Defendant also argues the Full Commission improperly determined plaintiff’s average weekly wage. In its Opinion and Award, the Full Commission found that “[d]efendant shall pay plaintiff temporary total disability compensation at the rate of \$620.00 per week for the periods from March 18, 2001 through January 25, 2002 and from January 24, 2003 and continuing until further Order of the

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Commission.” Defendant claims plaintiff’s weekly wage was inflated due to the amount of overtime he worked in the year prior to his injury by accident and his decrease in wages was not caused solely by the accident, but rather also by the lack of overtime available for plaintiff to work subsequent to his injury and his wages should be recalculated.

The Full Commission found as fact that “[o]n April 10, 2001, defendant filed an amended Form 60 listing an average weekly wage for plaintiff of \$1,097.40, which yields the maximum compensation rate for 2001 of \$620.00 per week.” This finding was not assigned as error by defendant and is binding upon this Court. Furthermore, evidence presented at the hearing before Deputy Commissioner Glenn established that overtime was still available to defendant’s workers and defendant had moved plaintiff to a position where his overtime was not limited to that available on a single production line. *See Derosier v. WNA, Inc.*, 149 N.C. App. 597, 602, 562 S.E.2d 41, 45 (2002). We find competent evidence supports the Full Commission’s determination of plaintiff’s average weekly wage. This assignment of error is overruled.

IV

[4] Finally, defendant argues the Full Commission erred in finding it is not entitled to initiate vocational rehabilitation. “In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.” N.C. Gen. Stat. § 97-25 (2003).

The Full Commission found as fact that plaintiff has been assigned a 100% permanent partial impairment rating to his right leg and that, physically, plaintiff is capable of sedentary work for eight hours a day. However, plaintiff has been found to be unable to work due to psychological disability directly related to his chronic pain and physical disability. Plaintiff was seen by three different doctors concerning his psychological conditions, one of which conducted an independent medical examination at the request of defendant. The Full Commission found the opinions and conclusions of each of the doctors examining and treating plaintiff’s psychological condition were all consistent. Furthermore, the Full Commission found “[p]lain-tiff has not reached maximum medical improvement of his depression and since January 24, 2003 has continued to be unable to work

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due to his disabling depression and the physical pain and disability caused by his admittedly compensable injury of January 29, 2001.”

In light of the findings, it is clear the Full Commission exercised its sound and proper discretion in denying defendant’s request for vocational rehabilitation services until plaintiff is released by his treating physicians to return to work or participate in vocational rehabilitation services. *See, Shoemaker v. Creative Builders*, 150 N.C. App. 523, 563 S.E.2d 622 (2002) (this Court affirmed the Full Commission’s finding that vocational rehabilitation was futile and was properly denied based on the testimony of the plaintiff’s treating physician). This assignment of error is overruled.

For the foregoing reasons, the Opinion and Award of the Full Commission is affirmed.

Judges HUDSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. ERNEST KEITH JORDAN, DEFENDANT

No. COA04-1380

(Filed 15 November 2005)

1. Sentencing— prior convictions—indigency—insufficient evidence

A defendant being sentenced failed to meet his burden of proving that he was indigent at the time of challenged prior convictions. N.C.G.S. § 15A-980.

2. Sentencing— prior convictions—presumption of regularity—right to counsel

Prior convictions were entitled to a presumption of regularity in a sentencing proceeding where the convictions were 20 years old and the records had been routinely destroyed. The trial court did not err by placing the burden of proof on defendant, who offered no reason that the presumption of regularity should not apply.

3. Sentencing— prior convictions—jury findings—not required

Jury findings were not required where a defendant sentenced within the presumptive range challenged his prior convictions.

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The State met its burden by presenting certified records, and the trial court was entitled to sentence defendant in the presumptive range without further proof.

4. Indictment and Information— sentencing factors—not required

Sentencing factors are not required to be alleged in the indictment.

Appeal by defendant from judgment entered 19 May 2004 by Judge Kenneth C. Titus in Alamance County Superior Court. Heard in the Court of Appeals 17 August 2005.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

GEER, Judge.

Defendant Ernest Keith Jordan appeals from his conviction and sentence for assault with a deadly weapon inflicting serious injury. He challenges only the trial court's calculation of his prior record level, contending (1) that the court should have granted his motion to suppress use of certain prior convictions on the grounds that they were obtained in violation of his right to counsel and (2) that a jury rather than the trial judge should have determined defendant's prior record level. We hold that the Sixth Amendment did not require that a jury determine defendant's prior record level. Further, the trial court properly applied N.C. Gen. Stat. § 15A-980 (2003) in determining that defendant failed to meet his burden of proving that prior convictions were obtained in violation of his right to counsel.

Facts

Defendant and Michael Lindley lived in the same apartment complex. On 19 October 2003, Lindley went to defendant's apartment; both men had consumed significant quantities of alcohol. Defendant began talking about fighting and, according to Lindley, announced, "[C]an't nobody whoop me. I'm the baddest man that ever was." Lindley got up to leave, but defendant got "up right there in [his] space," leading Lindley to strike defendant on the side of the head.

Lindley then went to a local store. Upon returning to his own apartment, Lindley saw defendant in the building stairwell with a

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shotgun. Lindley apologized for hitting defendant and asked him to put the gun away. Instead, defendant shot Lindley in the left arm. Lindley, as a result, spent six weeks in the hospital.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The jury found him guilty of assault with a deadly weapon inflicting serious injury. The trial judge determined that defendant had a prior record level of III, based on eight prior class A1 or 1 misdemeanor convictions. He then sentenced defendant in the presumptive range to 34 to 50 months imprisonment.

Discussion

Prior to trial, defendant filed a motion to suppress his prior convictions under N.C. Gen. Stat. § 15A-980, alleging that all nine prior misdemeanor convictions listed on the State's sentencing worksheet were obtained in violation of defendant's right to counsel. At trial, the State withdrew one conviction because it was not a prior conviction of defendant and defendant did not pursue suppression for three others.

With respect to the remaining five convictions—the most recent of which occurred in 1987—the trial court found that defendant failed to meet his burden of proving that they were obtained in violation of his right to counsel. When these five convictions were included in the calculation, defendant had a prior record level of III rather than II.

[1] Defendant argues that the trial court erred in finding that he failed to meet the requirements of N.C. Gen. Stat. § 15A-980 for suppressing his prior convictions.¹ N.C. Gen. Stat. § 15A-980(a) provides that “[a] defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel” if the State intends to use it to impeach the defendant or if its use will result in a lengthened sentence or a sentence that would not otherwise be imposed.

N.C. Gen. Stat. § 15A-980(c) provides further:

When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving

1. As an initial matter, defendant argues that this Court should remand his case to the trial court because the basis upon which the trial court denied his motion to suppress is unclear. Based upon our review of the transcript, it is apparent that the trial court denied the motion because it determined that defendant had failed to meet his burden of proving that he was improperly denied counsel in connection with the prior convictions.

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ing by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a).

This Court has held that N.C. Gen. Stat. § 15A-980(c) requires that a defendant prove *all three* of the following facts: (1) he was indigent, (2) he had no counsel, and (3) he did not waive his right to counsel. *State v. Rogers*, 153 N.C. App. 203, 216, 569 S.E.2d 657, 666 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442 (2003).

The only evidence offered by defendant to meet his burden was his own testimony that he did not have an attorney for each conviction and that he was not able to afford one at that time.² In *Rogers*, this Court held that testimony by a defendant, standing alone, “that he could not afford an attorney at the time of a prior conviction does not prove by a preponderance of the evidence that the defendant was indigent, as required under N.C.G.S. § 15A-980.” *Id.* at 217, 569 S.E.2d at 666. The Court then held: “Having concluded defendant failed to prove by a preponderance of the evidence that he was indigent at the time of the prior convictions, we need not consider whether defendant had waived his right to counsel.” *Id.* See also *State v. Brown*, 87 N.C. App. 13, 22-24, 359 S.E.2d 265, 270-71 (1987) (upholding denial of motion to suppress when the sole evidence of indigency was the defendant’s testimony that he could not afford an attorney).

Here, defendant contends that a finding of indigency is supported not only by his own testimony, but also by the trial court’s finding *in this case* that defendant was indigent both at the trial and at the appellate level. The fact that defendant may presently be indigent is not, however, relevant to whether defendant was indigent when convicted during the period 1981 through 1987, the time frame of the prior convictions at issue. *Rogers* and *Brown*, therefore, establish that the trial court did not err in determining that defendant failed to meet his burden of proving that he was indigent at the time of the prior convictions.

2. As to one of these convictions, defendant simply testified that he had “no idea” about the case, suggesting that it was not actually his conviction. Defendant does not, however, argue on appeal that the State failed to meet its burden of proving that defendant was the perpetrator with respect to each of the convictions.

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[2] Defendant next argues that by placing the burden of proof on defendant, the trial court violated *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Defendant states in his brief that he “strenuously contends that under *Boykin* the burden is on the state to show the *presence* of an attorney or lack of indigency, rather [than] the burden being on the Defendant to show the *absence* of an attorney or the fact of indigency.” Defendant notes that the trial court expressed concerns about *Boykin* in light of the fact that because of the age of defendant’s prior convictions, most of the documentation regarding those convictions had been destroyed.

In *Boykin*, the United States Supreme Court found reversible error when a trial judge accepted a defendant’s guilty plea without creating a record affirmatively showing that the plea was knowing and voluntary. *Id.* at 242, 23 L. Ed. 2d at 279, 89 S. Ct. at 1711. The Court held that a waiver of rights resulting from a guilty plea will not be inferred “from a silent record.” *Id.* Defendant also points to language in *Boykin* stating that “‘[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.’” *Id.* (quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L. Ed. 2d 70, 77, 82 S. Ct. 884, 890 (1962)).

In *Parke v. Raley*, 506 U.S. 20, 22-23, 121 L. Ed. 2d 391, 399, 113 S. Ct. 517, 519 (1992), however, the Supreme Court revisited and clarified *Boykin*. In *Raley*, the Court considered Kentucky’s recidivist sentencing statute. *Id.* at 23, 121 L. Ed. 2d at 400, 113 S. Ct. at 520. As defendant does here, the defendant in *Raley* challenged the constitutionality of the Kentucky statute under *Boykin* on the grounds that it did not require the prosecution to bear the burden of proving the validity of prior convictions. *Id.* at 22-23, 121 L. Ed. 2d at 400, 113 S. Ct. at 520. In rejecting the defendant’s argument, the Court explained:

We see no tension between the Kentucky scheme and *Boykin*. *Boykin* involved direct review of a conviction allegedly based upon an uninformed guilty plea. Respondent, however, never appealed his earlier convictions. They became final years ago, and he now seeks to revisit the question of their validity in a separate recidivism proceeding. To import *Boykin*’s presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the “presumption of regularity” that attaches to final judgments, even when the question is waiver of constitu-

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tional rights. Although we are perhaps most familiar with this principle in habeas corpus actions, it has long been applied equally to other forms of collateral attack. Respondent, by definition, collaterally attacked his previous convictions; he sought to deprive them of their normal force and effect in a proceeding that had an independent purpose other than to overturn the prior judgments.

Id. at 29-30, 121 L. Ed. 2d at 403-04, 113 S. Ct. at 523 (internal citations omitted).

The Court then observed that “[t]here is no good reason to suspend the presumption of regularity” when a defendant collaterally attacks a prior conviction being used to enhance a sentence. *Id.* at 30, 121 L. Ed. 2d at 404, 113 S. Ct. at 523. The Court wrote:

This is not a case in which an extant transcript is suspiciously “silent” on the question whether the defendant waived constitutional rights. Evidently, no transcripts or other records of the earlier plea colloquies exist at all. . . . The circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old. But *Boykin* colloquies have been required for nearly a quarter century. On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights. In this situation, *Boykin* does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained.

Id., 113 S. Ct. at 524. The Court then concluded: “Our precedents make clear . . . that even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant.” *Id.* at 31, 121 L. Ed. 2d at 405, 113 S. Ct. at 524.

In this case, defendant is collaterally attacking his prior convictions on the ground that they were obtained in violation of his constitutional right to counsel. Under *Raley*, those prior convictions are entitled to a “presumption of regularity.” Defendant offers no reason why that presumption should not apply to challenges under N.C. Gen. Stat. § 15A-980; indeed, defendant fails to acknowledge *Raley* at all.

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Like *Raley*, the record in this case is not suspiciously silent; the 20-year-old records had been, according to the parties, routinely destroyed. Also as in *Raley*, at the time of the prior convictions, defendant's right to counsel had been long recognized. We can perceive no reasoned basis upon which to distinguish *Raley*. Based on *Raley*, we hold that defendant's argument that *Boykin* precluded placing the burden of proof on defendant is without merit.

[3] Defendant has also filed a motion for appropriate relief based on *Shepard v. United States*, 544 U.S. 13, 161 L. Ed. 2d 205, 125 S. Ct. 1254 (2005), which was decided after defendant filed his brief on appeal. Defendant contends that *Shepard* requires that a jury decide whether his prior convictions were obtained in violation of his constitutional right to counsel.

We first note that defendant's argument is actually based on *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) and—although unmentioned in defendant's brief—on *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), in which the Supreme Court held that the principles of *Apprendi* applied with respect to sentencing. Defendant's counsel was aware of *Blakely*, as indicated by defendant's abandoned fifth assignment of error, which states that the trial court erred under *Blakely* in failing to find a specified mitigating factor. At the time of the filing of his initial brief, defendant was in a position to make the arguments raised in his motion for appropriate relief, but failed to do so. Nevertheless, because this Court previously allowed defendant's request to file a supplemental brief addressing *Shepard*, we exercise our discretion to consider defendant's arguments.

In *Apprendi*, the United States Supreme Court held that the Sixth Amendment requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455, 120 S. Ct. at 2362-63. Subsequently, our Supreme Court held that the “statutory maximum” in North Carolina is the top of the presumptive range:

Applied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt.

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State v. Allen, 359 N.C. 425, 437, 615 S.E.2d 256, 264-65 (2005). As set out in *Allen*, therefore, the *Apprendi* and *Blakely* requirement of a jury applies in sentencing when (1) the fact results in a sentence in excess of the presumptive range, and (2) the fact is other than that of a prior conviction.

We first note that defendant was sentenced within the presumptive range. The trial court's findings regarding defendant's prior convictions did not increase the penalty imposed on defendant beyond the presumptive range. Accordingly, *Allen* suggests that neither *Apprendi* nor *Blakely* should apply. See also *Allen*, 359 N.C. at 439, 615 S.E.2d at 266 ("We emphasize that *Blakely*, which is grounded in the Sixth Amendment right to jury trial, affects only those portions of the Structured Sentencing Act which require the sentencing judge to consider the existence of aggravating factors not admitted to by a defendant or found by a jury and which permit the judge to impose an aggravated sentence after finding such aggravating factors by a preponderance of the evidence."). In *State v. Wissink*, 172 N.C. App. 829, 837, 617 S.E.2d 319, 325 (2005), however, this Court held "that the trial court erred by adding a point to defendant's prior record level [because the crime was committed while the defendant was on probation] without first submitting the issue to a jury to find beyond a reasonable doubt." Although the Court did not address the requirement in *Allen* that the fact at issue must cause the defendant's sentence to be increased above the presumptive range,³ we are not free to revisit the decision in *Wissink*. In *re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The parties debate whether this case involves the other predicate set out in *Allen* and *Apprendi*: that the disputed fact be other than the fact of a prior conviction. While the State contends that the issues involved fall squarely within the exception to *Apprendi*, defendant urges that a jury must resolve all factual disputes relating to a prior conviction.

In *Shepard*, the United States Supreme Court considered the ability of a trial judge to resolve disputed factual issues about a prior conviction. *Shepard* involved the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e) (2000), which mandates a 15-year mini-

3. See *Wissink*, 172 N.C. App. at 837, 617 S.E.2d at 325 ("In this case, a fact other than a prior conviction, defendant's probationary status, that increased defendant's sentence was not submitted to a jury and proved beyond a reasonable doubt."). The Court did not distinguish between facts that increased a sentence within the presumptive range and facts that caused the sentence to exceed the presumptive range.

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mum prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. *Shepard*, 544 U.S. at 15, 161 L. Ed. 2d at 211, 125 S. Ct. at 1257. ACCA considers burglary a violent felony if committed in a building or enclosed space, but not if committed in a boat or motor vehicle. *Id.* Because the *Shepard* defendant's prior state convictions were obtained under a statute that did not limit burglary in that manner, the question arose regarding what information a trial court could consider in deciding whether the state convictions fell within the scope of ACCA. In deciding to enhance the defendant's sentence, the trial court considered police reports and complaint applications that contained details suggesting the defendant's prior burglaries were committed within a building or enclosed space. *Id.* at 17, 161 L. Ed. 2d at 212, 125 S. Ct. at 1258.

While the Supreme Court did not question the trial court's ability to resolve this factual dispute without a jury, the Court limited the scope of material that the trial court could consider under ACCA to "records of the convicting court approaching the certainty of the record of conviction." *Id.* at 23, 161 L. Ed. 2d at 216, 125 S. Ct. at 1261. The plurality concluded that this limitation was necessary to avoid the Sixth Amendment concerns underlying *Apprendi*. *Id.* at 25, 161 L. Ed. 2d at 217, 125 S. Ct. at 1262.

The Fourth Circuit has recently succinctly summarized the Supreme Court's analysis and conclusion in *Shepard*:

[The Supreme Court] prohibited judges from resolving a "disputed fact . . . about a prior conviction," *id.* at 1262, if doing so required data—like that found in police reports—that was not inherent in that prior conviction. At the same time, however, *Shepard* explicitly affirmed that the prior conviction exception remained good law. *Id.* at 1262. To this end, the Court authorized judges to rely on a variety of conclusive court documents when determining the nature of a prior conviction. Approved sources include, for instance, the prior court's jury instructions or the "charging documents filed in the court of conviction." *Id.* at 1259. When there was no jury in the prior case, judges may use not only charging documents but "a bench-trial judge's formal rulings of law and findings of fact." *Id.* For prior guilty pleas, "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or [] some

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comparable judicial record of this information,” are all also available for use. *Id.* at 1263 n.3.

United States v. Thompson, 421 F.3d 278, 281-82 (4th Cir. 2005) (alteration in original).

With respect to the application of the *Shepard* analysis to this case, the parties have overlooked a fundamental distinction. The *Shepard* Court recognized that “the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury’s finding of any disputed fact *essential* to increase the ceiling of a potential sentence.” *Shepard*, 544 U.S. at 25, 161 L. Ed. 2d at 217, 125 S. Ct. at 1262 (emphasis added). In *Shepard*, the trial court could not impose the sentence unless the prosecution proved that the defendant was previously convicted of a violent felony. It squarely fell within *Apprendi* and *Blakely* because it required proof by the Government of facts beyond those found by the jury. *See Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413, 124 S. Ct. at 2537 (holding that a jury must find any facts necessary to impose a sentence greater than that which “a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant” (emphasis omitted)).

In this case, however, the trial court was entitled to impose the sentence at issue based on the jury’s findings and the State’s proof of defendant’s prior convictions. The State met its burden of proving the prior convictions by presenting a certified Division of Criminal Information printout and a certified Division of Motor Vehicles driving history. N.C. Gen. Stat. § 15A-1340.14(f) (2003) (allowing proof of prior convictions by a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts). Defendant does not argue that the State failed to meet the requirements of N.C. Gen. Stat. § 15A-1340.14. As explained above, the State had no further burden and the trial court was entitled to sentence defendant to the presumptive range sentence without proof of any further facts. *Apprendi* and *Blakely* are, therefore, not implicated.

Defendant’s argument regarding the validity of his prior convictions—an issue upon which he bore the burden of proof—is an effort to decrease the sentence that he would otherwise receive. Thus, the disputed fact is not “essential to increase the ceiling of a potential sentence,” *Shepard*, 544 U.S. at 25, 161 L. Ed. 2d at 217, 125 S. Ct. at

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1262, but rather is essential to decrease the potential sentence. Defendant's collateral attack on his prior convictions is analogous to a defendant's seeking to prove mitigating circumstances. Our Supreme Court confirmed in *Allen* that *Blakely* does not require that a jury make findings with respect to mitigating factors. *Allen*, 359 N.C. at 439, 615 S.E.2d at 266 ("Those portions of N.C.G.S. § 15A-1340.16 which govern a sentencing judge's finding of mitigating factors and which permit the judge to balance aggravating and mitigating factors otherwise found to exist are not implicated by *Blakely* . . .").

We have found no authority in any jurisdiction suggesting that a jury must decide issues—upon which a defendant has the burden of proof—that would decrease a defendant's sentence. The Fourth Circuit has, however, held in an unpublished opinion that neither *Blakely* nor *Shepard* required reversal when a trial court rejected the defendant's contention that one of the convictions used in determining his sentence was obtained in violation of his right to counsel. *United States v. Jones*, Nos. 04-4179, 04-4183, 2005 U.S. App. LEXIS 21484, at *4-5 (4th Cir. Oct. 4, 2005) (per curiam). We similarly hold that the trial judge did not err in resolving the factual issues underlying defendant's motion to suppress his prior convictions.

[4] Finally, defendant's motion for appropriate relief also argues that under *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), the trial court was without jurisdiction to impose a sentence above a prior record level I because defendant's prior convictions were not alleged in his indictment. Our Supreme Court has, however, recently overruled *Lucas* to the extent it required that sentencing factors be alleged in an indictment. *Allen*, 359 N.C. at 438, 615 S.E.2d at 265. We, therefore, affirm the sentence imposed by the trial court.

No error.

Judges CALABRIA and ELMORE concur.

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STATE OF NORTH CAROLINA v. ANDRE LJARN EDWARDS, DEFENDANT

No. COA04-1504

(Filed 15 November 2005)

1. Discovery— motion for production—laboratory protocols associated with DNA testing

The trial court did not commit prejudicial error in a prosecution for first-degree murder, first-degree rape, and other crimes by denying defendant's written motion for production of the laboratory protocols associated with DNA testing that would be presented at trial, because the error was harmless beyond a reasonable doubt when the question of defendant's identity was not at issue during this trial based on defendant's choice of defense. Thus, the State did not need the DNA evidence to link defendant to the crimes. N.C.G.S. § 15A-903(e).

2. Evidence— failure to allow expert testimony—psychologist

The trial court did not err in a prosecution for first-degree murder, first-degree rape, and other crimes by excluding testimony of defendant's psychologist concerning certain conversations he had with defendant, because the State did not choose to explore the basis for the defense expert's opinion at trial, and thus, the trial court was not obligated to allow the expert to testify regarding the statements made by defendant.

3. Homicide— attempted murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted murder of an 11-month-old child because the evidence viewed in the light most favorable to the State revealed that: (1) a jury could reasonably conclude from the facts that defendant knew that no one would discover the mother's body and the child for a long time in a deserted area; and (2) the evidence was sufficient for a jury to decide that defendant would not expect an 11-month-old child to survive in a remote location, but would starve, die of dehydration, and/or exposure, or suffer from such effects of nature as insects and wild animals before anyone found him.

4. Appeal and Error— preservation of issues—failure to argue

Assignments of error that defendant did not argue on appeal are deemed abandoned under N.C. R. App. P. 28(a).

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Appeal by defendant from judgments entered 26 March 2004 and 11 October 2004 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 22 August 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Winifred H. Dillon for defendant-appellant.

GEER, Judge.

This appeal arises out of defendant Andre Ijarn Edwards' conviction of a number of charges resulting from a carjacking and the subsequent rape and murder of Ginger Hayes and the attempted murder of her 11-month-old son, Nicholas. On appeal, defendant argues that the trial court erred by denying his motion to allow into evidence the laboratory protocols associated with DNA testing in this case. We hold this error to be harmless beyond a reasonable doubt because the question of defendant's identity was not at issue during his trial, and therefore the State did not need the DNA evidence to link defendant to the crimes. Defendant also argues that the trial court erred by not allowing his psychologist to testify to the substance of certain conversations he had with defendant. Because, however, the State did not choose to explore the basis for defendant's expert's opinion at trial, the trial court was not obligated to allow the expert to testify regarding the statements made by defendant. As for defendant's final contention, we hold, based on our review of the record, that the trial court properly denied defendant's motion to dismiss the charge of attempted murder.

Facts

The State's evidence in this case tended to show the following. On 30 June 2001, Jeremy and Ginger Hayes, their 11-month-old son Nicholas, and Ginger's brother Tony West were driving a Ford Focus from Supply, North Carolina to their home in Virginia Beach, Virginia. The family stopped for a break at a CVS pharmacy in Greenville, North Carolina, the halfway point of their trip. While Tony and Jeremy went inside the store to purchase snacks and drinks, Ginger remained outside to change Nicholas' diaper in the car.

Ginger had the back passenger side door open and was bending over changing Nicholas' diaper, when defendant approached and pushed her into the back seat. Defendant followed her into the car and made her crawl up to the front passenger side, while he crawled

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up to the driver's seat. Defendant then backed the car out of the CVS parking lot and drove away with Ginger and Nicholas. A postal worker who was passing through the CVS parking lot witnessed these events and immediately called the police on his cell phone. Jeremy and Tony meanwhile came out of the store and also contacted the police when they realized that Ginger, Nicholas, and the car were missing.

Approximately an hour later, a surveillance camera at a Food Lion grocery store in Rocky Mount, North Carolina filmed defendant and Ginger purchasing batteries and withdrawing \$100.00 in cash with Ginger's debit card. The video captured defendant standing directly behind Ginger and whispering in her ear as she was completing the transaction at the register.

Less than an hour later, defendant appeared at a friend's house in Nashville, North Carolina, driving the red Focus. Ginger and Nicholas were not with him. Defendant bragged about jewelry he had recently gotten, including a gold chain, a bracelet, and rings. He told his friends he had met a girl from Virginia.

That evening, approximately eight hours after defendant had forced Ginger into the car at the CVS, C.D. Thompson of Nashville was walking his dog Charlie through a deserted field about a half mile from his house. Charlie alerted to something in the tall grass, and Mr. Thompson, thinking the dog had found a snake, went to investigate. He found Nicholas lying face down in briars and honey-suckle. The baby, who was wearing nothing but a diaper, was sunburned and surrounded by flies. Approximately 50 feet away, Mr. Thompson saw Ginger lying on the ground. Neither Nicholas nor Ginger were moving or making any noise, and Mr. Thompson thought they were both dead.

Mr. Thompson returned home and called 911. The police arrived shortly thereafter, and as investigators approached the scene, Nicholas lifted his head. He was transported to the hospital still alive, where he was treated for first and second degree sunburn, scratches, and dehydration. A pediatric critical care expert testified that Nicholas' injuries, especially the sunburns, were life-threatening and that if he had not been found before nightfall he could have died as a result of exposure and dehydration.

Ginger was not alive when investigators reached her. An autopsy revealed that she had been raped and strangled and had

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suffered a broken neck and a skull fracture as the result of at least four heavy blows to the head. Her head, back, and shoulders bore rust-colored, circular marks, which were later determined to have come from an old tire rim that had been deposited in the field near her body. A forensic pathologist testified that Ginger died of head and neck trauma.

Defendant was arrested the same day. At the time of his arrest, he was in possession of Ginger's jewelry and some cocaine. He was charged with first degree murder, attempted first degree murder, three counts of armed robbery, two counts of first degree kidnapping, first degree rape, possession of cocaine, and unauthorized use of a motor vehicle. He was tried capitally and convicted of all charges, except that instead of three counts of armed robbery, he was convicted of one count of armed robbery for the jewelry he took from Ginger and two counts of common law robbery for the \$100.00 withdrawn from the ATM and for the Ford Focus. Following a capital sentencing proceeding, the jury was unable to agree on a recommendation as to punishment, and on 26 March 2004, defendant received a sentence of life in prison without parole for his first degree murder conviction, as well as various other consecutive aggravated sentences for his other nine convictions.

I

[1] Defendant's first argument on appeal is that the trial court committed prejudicial error in denying portions of his written motion for production of evidence. Specifically, defendant contends he was entitled to receive from the State a copy of the laboratory protocols related to any DNA test results that would be presented at trial. The State argued at the motion hearing that defendant was not entitled to these protocols because "[the defense] can get that from the person that testifies. I don't know why that makes any matter at all before—for their individual to look at." The trial court subsequently denied defendant's motion for production with respect to the protocols.

N.C. Gen. Stat. § 15A-903(e) (2003), *repealed by* 2004 N.C. Sess. Laws 154 § 4, at 517-20, which was in effect at the time of defendant's trial, provides:

Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in

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connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

This Court has held that “Section 15A-903(e) must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions.” *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992). “This information is necessary for the defendant to understand the testing procedure and to conduct an effective cross-examination of the State’s expert witness.” *State v. Fair*, 164 N.C. App. 770, 774, 596 S.E.2d 871, 873 (2004) (granting a new trial after a trial court erred in not requiring the State to provide discovery of data collection procedures because the requested information constituted laboratory protocols). Based on this Court’s prior interpretations of N.C. Gen. Stat. § 15A-903(e), the State concedes, and we are compelled to hold, that the trial court erred in denying defendant access to the protocols that he requested before his trial.

Defendant has, however, failed to demonstrate sufficient prejudice from this error. It is not entirely clear whether this Court should apply a harmless error analysis under N.C. Gen. Stat. § 15A-1443(a) (2003) or whether the State is required to prove harmless error beyond a reasonable doubt under § 15A-1443(b). *See Cunningham*, 108 N.C. App. at 196-97, 423 S.E.2d at 809 (applying the harmless beyond a reasonable doubt standard when the State improperly failed to produce an SBI laboratory report). We need not resolve this question since we have concluded that the error was harmless beyond a reasonable doubt.

Here, defendant argues that the DNA evidence was the only evidence offered by the State to support the charge of first degree rape. He has overlooked the fact that defendant’s trial counsel asserted in his opening statement that “[t]he facts of what happened in this case are not in dispute” and that defendant “accepts responsibility for what happened on that day.” Throughout the trial, the defense fo-

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cused on defendant's mental state and not on whether defendant was in fact the perpetrator of the crimes, including the rape. Indeed, defendant conducted no cross-examination at all of the State's DNA expert. In short, the DNA testing became, in effect, immaterial to the trial because of defendant's choice of defense. Any error regarding production of the protocols was, therefore, harmless beyond a reasonable doubt. *Cf. State v. Thompson*, 110 N.C. App. 217, 225, 429 S.E.2d 590, 595 (1993) (court's failure to allow defendant's fingerprint expert to testify was harmless error when the prosecution did not need to use the fingerprints to link defendant to the crime).

II

[2] Defendant next argues that the trial court erred by excluding testimony of defendant's psychiatrist, Dr. James Hilkey, concerning conversations that the psychiatrist had with defendant. Defendant contends that since these conversations formed the basis for Dr. Hilkey's expert opinion as to defendant's mental state at the time of the crimes, they should have been admissible at trial under N.C.R. Evid. 705.

Rule 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

According to the official commentary, N.C.R. Evid. 705 is designed to allow an "expert to give his opinion without prior disclosure of the underlying facts unless an adverse party requests otherwise." N.C. Gen. Stat. § 8C-1, Rule 705 cmt. (2003). It is well-established, however, that " 'Rule 705 does not . . . make the bases for an expert's opinion automatically admissible.' . . . 'Only if an adverse party requests disclosure must the trial court require the expert to disclose the underlying facts of his opinion.' " *State v. Workman*, 344 N.C. 482, 495, 476 S.E.2d 301, 308 (1996) (quoting *State v. Baldwin*, 330 N.C. 446, 456, 412 S.E.2d 31, 37 (1992)). *See also Baldwin*, 330 N.C. at 456-57, 412 S.E.2d at 37-38 (holding that the trial court's decision to

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exclude defendant's hearsay statements, which defendant contended should have been admitted under Rule 705, was not an abuse of discretion); *State v. Ballard*, 127 N.C. App. 316, 320-21, 489 S.E.2d 454, 457 (1997) (same), *rev'd on other grounds*, 349 N.C. 286, 507 S.E.2d 38 (1998).

Here, because the State did not choose to explore the basis for Dr. Hilkey's opinion, the trial court was not obligated to allow the expert to testify as to statements that formed the basis for this opinion. The only statements that defendant contends should have been admitted are (1) a statement of remorse and (2) a statement that defendant claimed to have little memory of the events at issue. Since defendant's remorse was not relevant to his ability to premeditate and deliberate, and since the trial court allowed Dr. Hilkey to testify extensively regarding his opinion and what he relied upon, excluding only the actual words used by defendant, we can perceive no abuse of discretion. *See State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984) (holding that the trial court is "afforded wide latitude of discretion when making a determination about the admissibility of expert testimony").

III

[3] Defendant's final argument on appeal is that the trial court erred in denying defendant's motion to dismiss the charge of attempted murder of Nicholas. He contends that the State failed to present sufficient evidence that defendant had the requisite intent to kill, as Nicholas' death was not a foregone conclusion at the time defendant abandoned him in the field. In so arguing, defendant is incorrectly viewing the evidence in the light most favorable to him rather than to the State.

When considering a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether the State has presented substantial evidence of every essential element of the crime and that the defendant was the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). The court must view the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*,

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339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

Because “[t]he crime of attempt requires an act done with the specific intent to commit the underlying offense,” one must specifically intend to kill in order to commit the crime of attempted first degree murder. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000). Rather than simply showing that the defendant committed an intentional act that could have resulted in death, the State “must show that the defendant intended for his action to result in the victim’s death.” *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). “ ‘An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.’ ” *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 86-87 (1994) (quoting *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964)). “ ‘[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred.’ ” *Id.* (quoting *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982)). “Moreover, an assailant ‘must be held to intend the natural consequences of his deliberate act.’ ” *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (quoting *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973)).

After reviewing the record, we hold that the State presented sufficient evidence to allow a reasonable juror to find that defendant possessed the specific intent to kill Nicholas. The evidence, considered in the light most favorable to the State, shows that defendant took the 11-month-old, who was too young to walk, with his mother to a deserted area, where defendant beat the mother to death before driving off, leaving the child in a field with weeds and grass a foot high, wearing only a diaper and with most of his body exposed to the hot midsummer sun. Since defendant had lived in an abandoned house not far from this field, he was familiar with the area, which was a quarter mile from the road and not easily accessible by vehicle. A jury could reasonably conclude from these facts that defendant knew—indeed, intended—that no one would discover Ginger and the child for a long time. Further, this evidence is sufficient for a jury to decide that defendant would not expect a child of this age to survive in this remote location, but rather would expect that—but for the fortuitous arrival of the dog Charlie and

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Mr. Thompson—the child would starve, die of dehydration and/or exposure, or suffer from such effects of nature as insects and wild animals before anyone found him.

Since the death of Nicholas would have been a natural consequence of the deliberate acts of defendant, a jury could infer that defendant intended that consequence. Therefore, we hold that the State presented sufficient evidence of defendant's specific intent to kill the child. *See State v. Evangelista*, 319 N.C. 152, 158-59, 353 S.E.2d 375, 380-81 (1987) (upholding denial of motion to dismiss when there was "sufficient evidence from which a reasonable mind might conclude that the defendant had the requisite specific intent to kill," where defendant barricaded himself in a railroad compartment with the children he had kidnapped, and refused all offers of food, water, and other nourishment for the children, ultimately resulting in one infant's death from malnourishment); *see also State v. Brewer*, 328 N.C. 515, 402 S.E.2d 380 (1991) (finding sufficient evidence of specific intent to kill where defendant centered her car, containing her 16-year-old handicapped child in the front seat, on train tracks, and then exited the vehicle immediately before a train struck the car). The trial court, therefore, properly denied defendant's motion to dismiss with respect to the attempted murder charge.

[4] Since defendant has not chosen to argue his other assignments of error on appeal, they are deemed abandoned under N.C.R. App. P. 28(a).

No error.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. GILBERT GARCIA, DEFENDANT

No. COA05-127

(Filed 15 November 2005)

1. Burglary and Unlawful Breaking or Entering— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charge of breaking or entering, because: (1) defendant testified that he went into a company's building through the

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front door that had previously been closed after a companion entered the building through a skylight and let him in, thus meeting the entering a building element; and (2) the evidence viewed in the light most favorable to the State showed that defendant committed the offense with the intention to steal property from the company.

2. Constitutional Law— right to confrontation—testimonial evidence—codefendant’s written confession—harmless error

Although defendant’s right of confrontation was violated in a felonious breaking and entering case by the admission of a coparticipant’s written statement into evidence when it was testimonial evidence and defendant did not have a prior opportunity to cross-examine the coparticipant at any point before the statement was introduced into evidence, the error was harmless beyond a reasonable doubt because there was sufficient evidence of the intent element of the crime of felonious breaking and entering without the coparticipant’s statement.

3. Criminal Law— instructions—diminished capacity

The trial court did not commit plain error in a felonious breaking and entering case by failing to instruct the jury on diminished capacity, because defendant’s two statements regarding his mental condition were insufficient to create a reasonable doubt in the jurors’ minds that defendant was unable to form the specific intent necessary to commit the crime of breaking and entering.

4. Sentencing— aggravated range—*Blakely* error

The trial court in a felonious breaking and entering case did not sentence defendant in the aggravated range in violation of his Sixth Amendment right to a jury trial because, contrary to defendant’s assertion, his sentence falls within the presumptive range. Thus, the trial court’s findings of aggravating factors not admitted by defendant or submitted to the jury did not violate *Blakely v. Washington*, 542 U.S. 296 (2004).

5. Sentencing— enhancement for habitual offenders—not cruel and unusual punishment

Defendant’s sentence as an habitual felon did not constitute cruel and unusual punishment in violation of his Eighth Amendment rights in a felonious breaking and entering case

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because: (1) nothing in the Eighth Amendment prohibits our legislature from enhancing punishment for habitual offenders; and (2) defendant was sentenced within the presumptive range, and this case was not exceedingly unusual.

Appeal by Defendant from judgment entered 10 February 2004 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 11 October 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, Jr., for the State.

Daniel F. Read, for defendant-appellant.

WYNN, Judge.

The Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). In this case, Defendant contends the admission of the co-defendant's written confession violated the confrontation clause. While we agree that the admission of the statement violated the confrontation clause, we hold that under the facts of this case, such error was harmless. Further, we find no error in the trial court's failure to instruct on diminished capacity nor in its sentence of Defendant within the presumptive range.

The State presented evidence at trial tending to show that around 2:00 a.m. on 19 May 2003, two men flagged down a marked patrol car being driven by Deputy Ed Gaylor. The men stated that they had just observed a white male and two black males going into the front door of a business on Brookstown Avenue. They directed Deputy Gaylor to 627 Brookstown Avenue, the business of Essex Incorporated where he saw a light on inside the building and an ajarred front door. Responding to Deputy Gaylor's call for assistance, approximately fifteen to twenty police officers arrived, including Corporal Jimmy Edwards. The police issued a command over the public address system for the people inside the building to come out. Approximately five to ten minutes later, Defendant Gilbert Garcia, Frank Gordon, and James Reese came out of the building and were taken into custody.

After Defendant's arrest, Corporal Edwards went inside the building and found empty cabinets, open drawers, an axe blade on the

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floor, and a phone off the hook. He also found an open book bag containing guitar pedals, a paint ball gun and a mask. Another book bag contained pliers, a desk clock, and a wallet; and another book bag contained a knife. The phone lines to the business had been cut and the company's safe had been opened and moved.

At trial, the trial court admitted into evidence, over Defendant's objection, the following written statement by James Reese given to the police after he waived his rights:

First we were sitting at James Gohens' apartment on 615 N Spring St Apt 4. James came up with the plan to go into the Essex computer store. I'm the one that went through the roof and let everyone else in. We went in for money. I picked up a bookbag. The safe was open. Nothing was in the safe the door was open and the keys were in it. I don't know what my partners were doing we were all in separate rooms. I heard someone outside and then heard the PA system telling us to come out. I went through some drawers and stuff but I didn't take anything. I don't know if my partners took anything. There was a piece of glass on the roof I slid the glass out of the way and grabbed onto a wooden beam and let myself into the store. We took the bookbags with us inside. There was a laptop in the bookbag I was gonna take. I have no idea how long we were in there maybe 30 mins (sic) before the police got there. The liquor bottle was mine.

Defendant testified at trial that he has gastro-intestinal cancer and on 18 May 2003, he had taken five Demerol, vitamins, and steroids, prescribed by his oncologist. He stated that he and Mr. Gordon met with Mr. Reese and a man named "Taiwan" on that date. A friend of Taiwan's needed a computer and Mr. Reese told them he had a friend who was moving a business and could get access to the building to "look at some computer equipment." Defendant and Mr. Gordon met Mr. Reese at Essex and he came through the front door to let them in. Defendant stated that at that time he felt like he was "in a fog . . . numb." He then sat in a chair because he felt nauseous, drank a Coke and smoked a cigarette until the police arrived.

Following the denial of Defendant's motions to dismiss, a jury found Defendant guilty of felonious breaking and entering and of being an habitual felon. Upon finding an aggravating factor that: "The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy[.]" the

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trial court sentenced Defendant in the “aggravated range” to a term of 133 to 169 months imprisonment.

On appeal, Defendant argues that the trial court: (1) erred in denying his motions to dismiss the breaking and entering charge; (2) erred in admitting Mr. Reese’s written statement into evidence; (3) committed plain error by failing to instruct the jury on diminished capacity; (4) erred in sentencing him in the aggravated range in violation of his Sixth Amendment rights; and (5) erred in imposing a sentence that was so disproportionate that it violates the Eighth Amendment.

[1] First, Defendant contends the trial court erred in denying his motions to dismiss because the State failed to present sufficient evidence on the element of intent to commit larceny. We disagree.

When reviewing a motion to dismiss, we view “the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)), *cert. denied*, — U.S. —, — L. Ed. 2d — (04-9885) (3 October 2005). If we find that “substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to [have denied] the motion.” *Id.* (citing *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citing *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)).

The elements of felonious breaking and entering are: (1) the breaking and entering (2) of any building (3) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-54(a) (2004); *State v. Jones*, 151 N.C. App. 317, 328, 566 S.E.2d 112, 119 (2002). “A breaking or entering condemned by the statute may be shown to be a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key.” *State v. Bronson*, 10 N.C. App. 638, 640, 179 S.E.2d 823, 824-25 (1971) (citing *State v. Tippet*, 270 N.C. 588, 155 S.E.2d 269 (1967)). Defendant testified that he went into the building through the front door that had previously been closed, thus meeting the entering a building element. See N.C. Gen. Stat. § 14-54(a); *Bronson*, 10 N.C. App. at 640, 179 S.E.2d at 824-25.

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“The jury may infer the requisite specific intent to commit larceny at the time of the breaking or entering from the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged.” *State v. Costigan*, 51 N.C. App. 442, 445, 276 S.E.2d 467, 469 (1981) (internal cites omitted). Further, under the acting in concert theory, if a defendant joins another person “in a purpose to commit a crime, each of them, if actually or constructively present, is . . . guilty as a principal if the other commits that particular crime[.]” *State v. Barnes*, 345 N.C. 184, 231, 481 S.E.2d 44, 70 (1997) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)).

Defendant argues that the evidence only raises a conjecture or suspicion of his intent to commit a felony. But the evidence, viewed in the light most favorable to the State, shows that Defendant, along with Mr. Reese and Mr. Gordon, entered a building belonging to Essex at approximately 2:00 a.m. The business was closed and all the doors and windows locked. Mr. Reese entered the building by climbing a ladder, moving a piece of glass, and dropping through a skylight. Defendant had been informed previously that evening that Essex had a computer that could be resold, and the building had no alarm. Samuel Parker, the office manager, testified that none of the men had permission to be in the building and the phone lines to the business had been cut and were not working.

The evidence also shows that, following Defendant’s arrest, cabinets had their contents removed, drawers were open, an axe blade was on the floor, other things were on the floor and appeared out of place, and a phone was off the hook. Also, items belonging to Essex were found in book bags, including a guitar pedal, a paint ball gun and mask, a desk clock, and a laptop computer. We conclude that viewing this evidence in the light most favorable to the State, the evidence shows that Defendant unlawfully entered the building, and he committed the offense with the intention to steal property from Essex. See *Morgan*, 359 N.C. at 161, 604 S.E.2d at 904. Therefore, we overrule this assignment of error.

[2] Next, Defendant argues that the trial court erred in admitting Mr. Reese’s written statement into evidence as it was inadmissible hearsay and deprived him of his constitutional right to confront a witness pursuant to *Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177.

In *Crawford*, the United States Supreme Court held that the Confrontation Clause bars the admission of out-of-court testimonial

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statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. In evaluating whether a defendant's right to confrontation has been violated, we must determine: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217, *disc. review denied*, 358 N.C. 734, 601 S.E.2d 866 (2004).

"Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52, 158 L. Ed. 2d at 193. This Court interpreted *Crawford* and the nature of the term "police interrogations" in *State v. Pullen*, 163 N.C. App. 696, 594 S.E.2d 248 (2004). In *Pullen*, this Court ruled that a non-joined co-defendant's confession made to police in the course of their investigation was testimonial in nature. *Pullen*, 163 N.C. App. at 701, 594 S.E.2d at 252. Therefore, Mr. Reese's written confession made to the police during his interrogation is testimonial. *See id.*

Since Mr. Reese's written statement was testimonial, for the statement to be admissible, Mr. Reese must have been unavailable and Defendant needed to have had an opportunity to cross-examine him. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203; *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217. But the record is devoid of evidence that Defendant had a prior opportunity to cross-examine Mr. Reese at any point before the statement was introduced into evidence; accordingly, we hold that the trial court erred in allowing the State to introduce Mr. Reese's written statement.

Nonetheless, we must determine whether the trial court's error prejudiced Defendant. *State v. Bell*, 359 N.C. 1, 36, 603 S.E.2d 93, 116 (2004), *cert. denied*, — U.S. —, 161 L. Ed. 2d 1094 (2005). Because this error is one with constitutional implications, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2004); *State v. Lewis*, 360 N.C. 1, — S.E.2d — (2005). One way the State may meet its burden is by showing that there is overwhelming evidence of Defendant's guilt. *Bell*, 359 N.C. at 36, 603 S.E.2d at 116.

Defendant argues that Mr. Reese's statement was the only evidence of intent to commit larceny, as the statement indicated that he and his partners went in "for money." But as we have stated earlier,

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there was sufficient evidence of the intent element of the crime of felonious breaking and entering, without Mr. Reese's statement. Therefore, while the trial court erred in admitting Mr. Reese's statement into evidence, the error was not prejudicial.

[3] Defendant next argues that the trial court committed plain error by failing to instruct the jury on diminished capacity. We disagree.

Our Supreme Court adopted the plain error rule as an exception to the appellate court requirement of preserving basis for assignments of error at the trial court level. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) (applied to assignments of error regarding jury instructions); *see also* N.C. R. App. P. 10(c)(4). The proponent must show that:

[A]fter reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

We examine the entire record to decide whether the error "had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citation omitted). We determine whether the jury would have returned a different verdict absent the error. *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986).

An instruction on diminished capacity is warranted where the evidence of the defendant's mental condition is sufficient to raise a reasonable doubt in the mind of a rational trier-of-fact as to whether the defendant had the ability to form the necessary specific intent to commit the crimes for which he is charged. *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989). In *State v. Lancaster*, this Court held the evidence insufficient to warrant an instruction on diminished capacity. 137 N.C. App. 37, 527 S.E.2d 61, *disc. review denied in part and allowed in part on other grounds*, 352 N.C. 680, 545 S.E.2d 723 (2000). There, the defendant presented expert testimony

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evidence of substance abuse addictions and other behaviors and the defendant himself testified he had smoked crack cocaine and drank several beers over the course of the evening in question. *Id.* at 44-45, 527 S.E.2d at 67. This Court concluded “there was insufficient evidence of defendant’s mental condition to create a reasonable doubt in the jurors’ minds that defendant was unable to form the specific intent necessary to commit these crimes[.]” *Id.* at 45, 527 S.E.2d at 67.

In this case, Defendant testified that on 18 May 2003, he had taken five Demerol, which made him feel “in a fog.” He then testified that when he was inside the building he felt nauseous. This was the only testimony as to Defendant’s mental condition. No other evidence was admitted regarding Defendant’s mental condition.

Defendant’s two statements regarding his mental condition were insufficient to create a reasonable doubt in the juror’s minds that Defendant was unable to form the specific intent necessary to commit the crime of breaking and entering. *Clark*, 324 N.C. at 163, 377 S.E.2d at 64. The trial court did not err in not instructing the jury on diminished capacity.

[4] Next, Defendant contends that the trial court erred in sentencing him within the aggravated range in violation of his Sixth Amendment right to a jury trial. *See Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Since Defendant’s sentence falls within the presumptive range, we disagree.

The trial court sentenced Defendant to a minimum of 133 months imprisonment. The trial court also made findings of aggravating and mitigating factors. Defendant had a Level IV prior record level and was sentenced for a Class C felony. The presumptive range for that combination is a minimum sentence from 107 to 133 months. N.C. Gen. Stat. § 15A-1340.17(c) (2004). But a minimum of a 133 months overlaps with the minimum range for an aggravated sentence, which is 133 to 167 months. N.C. Gen. Stat. § 15A-1340.17(c). However, since Defendant’s punishment falls within the presumptive range, our Supreme Court has made it clear that no factors need be presented to the jury. *State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256, 265 (2005) (“[A]ny fact that increases the penalty for a crime *beyond the prescribed presumptive range* must be submitted to a jury and proved beyond a reasonable doubt.” (emphasis added)). Accordingly, since Defendant’s sentence falls within the presumptive range, the trial court’s findings of aggravating factors not admitted by Defendant or submitted to the jury did not violate *Blakely*.

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[5] Finally, Defendant argues that his sentence, as an habitual felon, is cruel and unusual punishment in violation of his Eighth Amendment rights. We disagree.

This Court recently held in *State v. Quick*, 170 N.C. App. 166, 170, 611 S.E.2d 864, 867 (2005), that “nothing in the Eighth Amendment prohibits our legislature from enhancing punishment for habitual offenders.” We further noted that “[o]ur habitual felon statute is the result of a deliberate policy choice by the legislature that those who repeatedly commit felonious criminal offenses should be segregated from the rest of society for an extended period of time.” *Id.* at 170, 611 S.E.2d at 866-67 (citing *State v. Aldridge*, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108 (1985)). Our Supreme Court has stated that “[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment’s proscription of cruel and unusual punishment.” *State v. Todd*, 313 N.C. 110, 119, 326 S.E.2d 249, 254 (1985) (quoting *State v. Ysaguiere*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)). In this case, Defendant was sentenced within the presumptive range of our statutory scheme as defined by Chapter 15 of the North Carolina General Statutes. Furthermore, we do not find that the case was “exceedingly unusual.” For these reasons, we conclude that Defendant’s habitual felon sentence did not violate his Eighth Amendment rights.

No error.

Judges McGEE and GEER concur.

JONATHON HELSIUS, PETITIONER v. ELWANDA S. ROBERTSON AND COUNTY OF
DURHAM, RESPONDENTS

No. COA05-08

(Filed 15 November 2005)

**1. Workers’ Compensation— claim by deputy—authority to
extinguish county’s lien—sovereign immunity**

There is specific statutory authority in the Workers’ Compensation Act authorizing a deputy sheriff who received both workers’ compensation insurance and a third-party settlement to seek a determination of Durham County’s authority to

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file a lien against his settlement proceeds. The trial court did not err by not dismissing the matter under sovereign immunity.

2. Workers' Compensation— subrogation—statute not unconstitutional

The workers' compensation statute which provides subrogation for a third-party settlement, N.C.G.S. § 97-10.2(j), is not unconstitutionally vague and does not violate due process. Neither does it violate the Exclusive Emoluments prohibition of the N.C. Constitution as to benefits received by deputy sheriffs or in the possibility of a double recovery.

3. Workers' Compensation— third-party settlement—subrogation denied

There was competent evidence supporting findings which themselves supported extinguishing Durham County's subrogation lien on a deputy's workers' compensation benefits, including the finding that petitioner's net recovery would otherwise be zero. The trial court did not abuse its discretion.

Appeal by respondent County of Durham from judgment entered 6 July 2004 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 14 September 2005.

Clayton, Myrick, McClanahan & Coulter, PLLC, by Robert D. McClanahan, for petitioner-appellee.

Office of the County Attorney, by Assistant County Attorney Curtis Massey, for County of Durham respondent-appellant.

JACKSON, Judge.

On 14 July 2003, Jonathon Helsius ("petitioner") was injured in the course and scope of his employment with the Durham County Sheriff's Office. While escorting a funeral procession, petitioner's motorcycle was struck by a vehicle driven by Elwanda Robertson.¹ As a result of the collision, petitioner sustained serious injuries including a severe concussion, pinpoint bleeding in his brain, a broken wrist, punctured lung, broken ribs, and compression frac-

1. Petitioner retained counsel to pursue a third party tort claim against defendant Elwanda Robertson, and agreed to settle his claims against her for the limits of her liability insurance, \$30,000.00. Petitioner had underinsured motorists coverage in the amount of \$50,000.00 per claimant, and he received \$20,000.00 as a result of this coverage. Defendant Robertson is not a party to this appeal and this aspect of the case is not before us.

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tures in his spine. Petitioner was admitted to the hospital following the accident, and was discharged a few days later. Petitioner was permitted to return to work full-time, but on light/desk duty on 1 September 2003, and he returned to full duty on 8 October 2003.

The County of Durham (“respondent”) paid petitioner a total of \$53,128.40 in workers’ compensation benefits, representing medical expenses, temporary total disability, and permanent partial disability compensation.

Petitioner applied to the trial court, pursuant to North Carolina General Statutes, section 97-10.2(j), for a determination of the amount of the County of Durham’s subrogation lien and to distribute the settlement amount. Petitioner presented extensive testimony at the hearing. Respondent did not present any evidence, but did present arguments in support of its various motions to dismiss based on sovereign immunity and violation of its rights under the North Carolina Constitution.

On 6 July 2004, the trial court entered an order denying all of respondent’s motions and extinguishing respondent’s subrogation lien. From this order the County of Durham appeals.

[1] Respondent first contends the trial court committed reversible error when it failed to dismiss the matter, as the County’s sovereign immunity had not been waived and thus barred the proceedings. We do not find this argument to be credible, and thus hold the trial court did not err.

In this State it is well established that counties are a part of the State government, and thus are entitled to sovereign immunity. *Daves v. Nash County*, 357 N.C. 442, 445, 584 S.E.2d 760, 762, *reh’g denied*, 357 N.C. 511, 587 S.E.2d 417 (2003); *White v. Commissioners of Chowan County*, 90 N.C. 437 (1884); *Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). A county may not be sued unless there is a specific statute authorizing the suit, or the county has consented to being sued or has waived its immunity. *Id.*

Respondent contends the county neither waived its sovereign immunity nor did petitioner allege a waiver of the immunity, and therefore petitioner’s petition for a determination on respondent’s lien should have been dismissed. However, respondent also argues that although petitioner’s action should be dismissed based on sovereign immunity, respondent still should be permitted to maintain a lien

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on petitioner's settlement proceeds pursuant to North Carolina General Statutes, section 97-10.2(j). Respondent effectively is asking this Court to permit it to maintain a lien on petitioner's settlement proceeds, while at the same time giving petitioner no means by which to challenge to the lien.

North Carolina General Statutes, section 97-10.2(j) (2004) provides in pertinent part:

[I]n the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose . . . to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, *in his discretion*, the amount, if any, of the employer's lien

N.C. Gen. Stat. § 97-10.2(j) (2004) (emphasis added). This statute is included in our State's workers' compensation laws, which specifically provide that the State of North Carolina, along with its political subdivisions (*i.e.* counties) are subject to the Workers' Compensation Act found in Chapter 97 of our General Statutes. N.C. Gen. Stat. § 97-7 (2004). Employees covered by the Workers' Compensation Act include "deputy sheriffs and all persons acting in the capacity of deputy sheriffs." N.C. Gen. Stat. § 97-2(2) (2004). The Act further provides that employers who must abide by the Act include

[t]he board of commissioners of each county of the State, . . . all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis.

N.C. Gen. Stat. § 97-2(3) (2004). Based upon the fact that county governments are subject to the Workers' Compensation Act and its provisions regarding payment and compensation under the Act, we hold there is specific statutory authority authorizing petitioner to seek a determination of the County of Durham's authority to file a lien against petitioner's settlement proceeds.

[2] Respondent next contends that North Carolina General Statutes, section 97-10.2(j) is unconstitutional under the North Carolina Constitution, for being vague and violative of its due process rights,

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and for violating the Exclusive Emoluments Clause. We have previously rejected the argument that North Carolina General Statutes, section 97-10.2(j) is unconstitutionally vague and violative of due process, and therefore need not address this issue. *See In re Biddix*, 138 N.C. App. 500, 530 S.E.2d 70, *disc. review denied*, 352 N.C. 674, 545 S.E.2d 418 (2000); *Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990). Therefore we only address respondent's contention that North Carolina General Statutes, section 97-10.2(j) violates the Exclusive Emoluments Clause of the North Carolina Constitution.

The Exclusive Emoluments Clause of the North Carolina Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32 (2004). Our Supreme Court has interpreted this Clause to provide that our

Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. Nor may it lawfully authorize a municipal corporation to pay gifts or gratuities out of public funds.

Brown v. Comrs. of Richmond County, 223 N.C. 744, 746, 28 S.E.2d 104, 105-06 (1943) (internal citations omitted); *Leete v. County of Warren*, 341 N.C. 116, 120, 462 S.E.2d 476, 479 (1995). In *Leete*, our Supreme Court recognized that "[s]alary, pension, insurance and similar benefits received by public employees are generally not unconstitutional exclusive emoluments and privileges. They constitute compensation in consideration of services rendered." *Leete*, 341 N.C. at 121, 462 S.E.2d at 479. Our Supreme Court further has stated that the benefits that deputy sheriffs receive pursuant to the Workers' Compensation Act are "conferred by reason of public service," and are not violative of the Exclusive Emoluments Clause of the North Carolina Constitution. *Towe v. Yancey County*, 224 N.C. 579, 580, 31 S.E.2d 754, 755 (1944).

Respondent argues that North Carolina General Statutes, section 97-10.2(j) allows for petitioner to have a double recovery, in that he is permitted to retain both the settlement proceeds, and the workers' compensation benefits paid by respondent, thereby creating a windfall for petitioner. Respondent contends that this windfall, permitted by the extinguishment of respondent's lien, is the aspect of the statute that violates the Exclusive Emoluments Clause. We do not agree.

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Our courts repeatedly have held that North Carolina General Statutes, section 97-10.2(j) “allows plaintiff a double recovery at the expense of the employer or carrier, in the discretion of the Superior Court judge. . . . [S]ince the language is clear and unambiguous, we must hold that the Legislature intended this possible result.” *Pollard v. Smith*, 90 N.C. App. 585, 588, 369 S.E.2d 84, 86 (1988), *rev’d on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989); *see also Wiggins v. Bushranger Fence Co.*, 126 N.C. App. 74, 77-78, 483 S.E.2d 450, 452, *disc. review denied*, 346 N.C. 556, 488 S.E.2d 825 (1997); *Allen*, 100 N.C. App. at 493-94, 397 S.E.2d at 332-33. Given that our legislature and courts allow for the possibility of double recovery by injured employees, and the fact that workers’ compensation benefits provided to sheriff’s deputies pursuant to the Workers’ Compensation Act are constitutional, we hold that North Carolina General Statutes, section 97-10.2(j) does not violate the Exclusive Emoluments Clause of the North Carolina Constitution.

[3] We next turn our attention to respondent’s final assignment of error that the trial court’s extinguishment of its lien was not supported by sufficient findings of fact and conclusions of law. This Court has held that although North Carolina General Statutes, section 97-10.2(j) does grant the trial court “discretion” in deciding to reduce or extinguish an employer’s lien on the employee’s settlement with a third party, this discretion “is not unlimited.” *In re Biddix*, 138 N.C. App. at 504, 530 S.E.2d at 72 (citing *Allen*, 100 N.C. App. at 495, 397 S.E.2d at 333). In exercising its discretion, the trial court must

“make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review.” Where the trial court makes sufficient findings of fact and conclusions of law, the due process rights of the employer have been protected.

Id. (quoting *Allen*, 100 N.C. App. at 495, 397 S.E.2d at 333). North Carolina General Statutes, section 97-10.2(j) provides that in exercising its discretion, the trial judge

shall consider the anticipated amount of prospective compensation the employer or workers’ compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems

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just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(j) (2004).

In the instant case, the trial court made the following specific findings of fact:

3. The liability insurance carrier for respondent Robertson, GMAC Insurance Company, has tendered to petitioner an offer of the limits of its policy of liability insurance coverage applicable to this incident, \$30,000.00.
4. Petitioner has purchased a policy of underinsured motorist coverage through State Farm Insurance Company in the amount of \$50,000.00. State Farm Insurance Company has tendered the limits of its coverage applicable to this incident, \$20,000.00
5. The County of Durham, as employer of petitioner, has provided workers' compensation benefits in the form of payment of medical expenses which have been incurred for the treatment of petitioner's injuries and for compensation in the total amount of \$53,128.40.

. . . .

7. The third party liability claim arising from the above-described vehicular collision has been resolved by settlement and the total amount of payment to be paid pursuant to said settlement is \$50,000.00
8. As a result of said collision, the petitioner suffered numerous serious and painful injuries The petitioner remained hospitalized for four days . . . and suffered a great deal of pain and disability for several weeks and months following this collision.
9. Although the petitioner returned to full duty in his capacity as a deputy sheriff with the respondent on October 8, 2003, he has continued to experience pain, weakness and other difficulties with the injuries which he has sustained. His orthopaedic surgeon has rendered opinions that the petitioner is permanently injured in the amount of five percent permanent partial impairment to his left wrist and twenty percent permanent impairment to his back.

. . . .

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11. The petitioner has suffered further items of damage to which he is entitled to recover against the negligent party who has caused his injury, including payment of chiropractic expenses, payment of the remainder of his lost income from the County of Durham, payment of his second employment income, calculated in the amount of \$3,996.00, and payment for pain and suffering already endured and pain and suffering to be endured in the future.
12. The negligent respondent, Elwanda S. Robertson, does not have sufficient assets to pay further towards her liability to the petitioner for further damages suffered by the petitioner which remain uncompensated.
13. That \$50,000.00 is an inadequate sum to compensate the petitioner, for said pain, suffering and past, present and future interference of his life as result of said injuries.

. . . .

15. The court has further considered the fact that, without reduction of the compensation lien of the employer, the net recovery to the petitioner would be zero. The court has also considered the likelihood that the petitioner . . . would prevail at a trial against the negligent respondent and would recover a sum far in excess of the funds which are available to pay for his damages.
16. The court has also considered that there is now a need for finality in this litigation, in that the petitioner has completed his active medical care and has returned to full duty to [sic] employment with the respondent, and that all sums which are available to pay for his damages have been received.
17. That justice would be served in this case by extinguishing the employer's compensation lien so that the petitioner can be justly compensated for the damages which he has suffered, for which he has received no compensation, for the injuries which he sustained while in the course and scope of his employment . . . [with] the County of Durham in his role as a deputy sheriff.

In its brief, respondent assigns error to almost all of the trial court's findings of fact and conclusions of law, however respondent failed to offer any argument in support of many of these assignments

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of error, therefore those not addressed below are deemed abandoned. N.C. R. App. P. 28(b)(6) (2005). In its brief, respondent specifically assigns error to, and properly preserves these for appellate review: the trial court's findings of fact numbers 8, 9, 11, 12, 13, 15, 17, and conclusions of law numbers 1, 2, and 3. We therefore limit our review to these specific portions of the trial court's order.

Respondent argues the trial court's findings of fact are not supported by competent evidence, and the court's conclusions of law are thus not supported by competent findings of fact. When reviewing a trial court's findings of fact, our role is to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings." *Id.* (citing *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987)). However, we review the trial court's conclusions of law *de novo*. *Id.*

At the hearing, petitioner testified concerning the details of the collision, the injuries he suffered, and his recovery following the collision. He stated that he had been diagnosed as having a five percent permanent partial disability in his left wrist, and a twenty percent permanent partial disability in his back. He testified, without objection, that he continues to experience pain in his wrist, shoulder, neck and back, and continues to be limited in the activities in which he can participate. Petitioner further testified regarding visits to a chiropractor for treatment of continuing stiffness in his neck and back, which he began to experience once he returned to full duty. Petitioner also testified about his secondary employment and the fact that he was unable to perform any secondary employment while not on full duty after the accident. He testified about the income he lost during this period, and submitted documents he prepared showing his lost income as determined using his prior years' taxes, all of which was admitted into evidence without objection. On cross-examination, petitioner testified that he and his retained counsel considered pursuing a third-party claim against Elwanda Robertson, however she did not have any assets beyond her insurance coverage. Petitioner stated that although respondent has paid most of his medical bills and two-thirds of his gross salary while he was out of work, he has not been compensated for the remaining one-third of his salary, his lost wages from his secondary employment, his expenses

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incurred in seeing the chiropractor, or for the pain and suffering he has already experienced and continues to experience. All of petitioner's testimony was admitted without objection by respondent.

Based on the evidence presented at the hearing, along with petitioner's responses to respondent's requests for admissions, we hold that there is competent evidence in the record to support the trial court's findings of facts 8, 9, 11, 12, and 13. With respect to finding of fact 15, the trial court was presented with evidence showing that petitioner had received \$50,000.00 in settlement proceeds, and that respondent claimed a lien in the amount of \$53,128.40. We therefore hold there was competent evidence to support the finding that petitioner's net recovery would be reduced to zero without the extinguishment of respondent's lien. Finding of fact 17 addresses the factors listed in North Carolina General Statutes, section 97-10.2(j), and we hold there is sufficient evidence to support the trial court's finding.

Based on the foregoing discussion concerning sovereign immunity and the constitutionality of North Carolina General Statutes, section 97-10.2(j), we hold the trial court's conclusions of law regarding these issues are supported by our State's case law. We further hold that based on the findings of fact, the trial court's conclusion of law stating that "justice requires that the workers' compensation lien of the County of Durham be extinguished" is supported by competent findings of fact. We recognize that the Workers' Compensation Act creates a system in which an employee may receive a "windfall," however the trial court has made specific findings of fact showing that this did not occur in the instant case.

We therefore hold the trial court did not abuse its discretion in extinguishing respondent's lien, and that the trial court properly considered the relevant factors in applying the provisions of North Carolina General Statutes, section 97-10.2(j) to petitioner's case.

Affirm.

Judges McGEE and McCULLOUGH concur.

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[174 N.C. App. 517 (2005)]

IN THE MATTER OF: E.C.

No. COA05-218

(Filed 15 November 2005)

1. Appeal and Error— preservation of issues—neglected child—guardianship and visitation

Issues concerning guardianship and visitation for a neglected child were preserved for appeal despite respondent's failure to object at the dispositional hearing.

2. Child Abuse and Neglect— appointment of guardian—timing

A guardian may be appointed by the trial court at any time during juvenile proceedings, including the dispositional hearing, when it finds such appointment to be in the juvenile's best interest, as here.

3. Child Abuse and Neglect— appointment of guardian—findings

The trial court was not required to make findings pursuant to N.C.G.S. § 7B-507(b) when appointing a guardian for a neglected child where the guardianship was not the permanent plan and did not end DSS's duty to continue reunification efforts with the parent.

4. Child Abuse and Neglect— guardianship—visitation

Awarding visitation for a neglected child is a judicial function which may not be delegated to the custodian of the child, although the trial court may grant some good faith discretion to suspend visitation, subject to notice and review by the court. The trial court here erred by failing to include an appropriate visitation plan in its dispositional order for the neglected child.

5. Child Abuse and Neglect— adjudication of neglect—circumstances from other county considered

In adjudicating a child neglected, a district court is not limited to considering only those circumstances occurring within its district; otherwise, abusive and neglectful parents could avoid court intervention by simply moving from county to county. Sufficient evidence was presented here to support the conclusion of neglect

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6. Child Abuse and Neglect— removal from custody—one of three grounds required—findings insufficient for dependency

In order to remove a juvenile from the parents' custody the trial court must determine that the juvenile is abused, neglected, or dependent, and a finding of any of the three grounds will support the court's decision. Although this respondent appealed on somewhat different grounds, and there was sufficient evidence of neglect, the trial court erred by concluding that a child was dependent without findings of fact concerning respondent's ability to provide care, supervision or an alternative arrangement for care.

Appeal by respondent mother from order entered 28 June 2004 by Judge J. Kent Washburn in Alamance County District Court. Heard in the Court of Appeals 21 September 2005.

Jamie L. Hamlett, for petitioner-appellee Alamance County Department of Social Services.

Richard Croutharmel, for respondent-appellant.

TYSON, Judge.

M.C. ("respondent") appeals from the trial court's order adjudicating her minor child, E.C. ("the child"), neglected and dependent and awarding legal guardianship of the child to Cecilia Pointer ("Ms. Pointer") with visitation in the discretion of Ms. Pointer. We affirm in part, vacate in part, and remand.

I. Background

Respondent gave birth to the child on 21 March 2003. The child was born with cocaine present within her system. The Orange County Department of Social Services ("DSS") determined respondent needed case management services and assigned a social worker to the case. Respondent entered "Sunrise," a substance abuse treatment program, on 11 August 2003. Respondent admitted she was unable to complete the Sunrise program because she "didn't want to follow directions" and engaged in confrontations with others in the program. Respondent had enrolled in two other substance abuse treatment programs prior to attending Sunrise. She completed a twenty-eight day program designed to prepare an individual to enter into a long-term program, but failed to complete the subsequent long-term program because she "chose not to."

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In October 2003, respondent and the child moved in with Ms. Pointer, respondent's cousin, in Alamance County. Respondent signed an agreement granting Ms. Pointer temporary custody of the child. Respondent agreed not to go anywhere alone with the child. Ms. Pointer was granted temporary custody of the child until 18 December 2003.

Difficulties arose between Ms. Pointer and respondent about a month after respondent and the child moved in with her. Respondent left the home for several days at a time leaving the child with Ms. Pointer. When respondent returned to the home, she would sleep for long periods of time with the child in the bed with her. Respondent would not awaken when the child cried. Respondent kept the room where she and the child stayed in a filthy condition.

On 7 December 2003, respondent came home appearing to be high or drunk. Ms. Pointer and respondent argued after Ms. Pointer asked respondent to clean up her room. Ms. Pointer was concerned about the child living in the filthy room. Respondent threatened to remove the child from Ms. Pointer's home. Respondent told Ms. Pointer she was going to a "crack house" with the child. Ms. Pointer testified she did not believe respondent would take the child to a "crack house." Ms. Pointer called the police to prevent respondent from removing the child from the home. This incident led DSS to file a petition alleging neglect and dependency of the child.

On 10 December 2003, the trial court conducted a non-secure custody hearing and continued the child in non-secure custody. Additional non-secure custody hearings were held on 17 December 2003, 21 January 2004, 4 February 2004, 25 February 2004, and 31 March 2004. At each hearing, the trial court ordered the child to remain in non-secure custody. The child was adjudicated neglected and dependent on 11 May 2004. The trial court entered a dispositional order on 26 May 2004 and awarded legal guardianship of the child to Ms. Pointer. Respondent appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) awarding guardianship of the child to Ms. Pointer; (2) ordering visitation between respondent and the child at the discretion of Ms. Pointer; (3) concluding respondent had neglected the child; and (4) concluding the child was dependent as to respondent.

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III. Preservation of Error

[1] DSS argues that respondent failed to preserve the assignments of error regarding legal guardianship and visitation for our review because she failed to object to the trial court's award of guardianship and its ruling on visitation at the conclusion of the trial. We disagree.

Rule 10(a) of the North Carolina Rules of Appellate Procedure provides "that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law" N.C.R. App. P. 10(a)(1) (2004). Respondent assigns error to the trial court's order granting Ms. Pointer legal guardianship of the child, as well as the visitation the trial court awarded respondent. Respondent's failure to object at the dispositional hearing is not a failure to preserve these issues for appeal. *Id.* Nor is a party required to object at the hearing or raise a motion in order to preserve this type of question for appellate review. *Id.* DSS's argument is overruled.

IV. Legal GuardianshipA. Appointment

[2] Respondent contends: (1) chapter 7B of the North Carolina General Statutes does not authorize awarding guardianship at the dispositional hearing following an adjudication; and (2) awarding guardianship is tantamount to ceasing reunification efforts and thus requires findings pursuant to N.C. Gen. Stat. § 7B-507(b), which was not done in this case. We disagree.

N.C. Gen. Stat. § 7B-600 governs the appointment of a guardian. It provides that "[i]n *any* case when no parent appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile." N.C. Gen. Stat. § 7B-600(a) (2003) (emphasis supplied). This statute permits the trial court to appoint a guardian at any time during the juvenile proceedings, including the dispositional hearing, when it finds such appointment to be in the juvenile's best interests. The dispositional order in this case demonstrates the court found guardianship to be in the child's best interest following the presentation of all the evidence at the adjudicatory hearing and after review of DSS's and guardian *ad litem*'s reports. Respondent did not appear

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at the dispositional hearing. “No parent appear[ing]” provide the court with additional grounds to appoint a guardian under the statute. *Id.* Respondent’s contention is overruled.

B. Guardianship Equates to Ceasing Reunification

[3] Respondent contends if the trial court has authority to award guardianship at the dispositional hearing such an award is tantamount to ceasing reunification efforts, and the trial court is required to make findings of fact pursuant to N.C. Gen. Stat. § 7B-507(b). Respondent asserts the trial court’s failure to make such findings was reversible error. We disagree.

Respondent argues the court’s award of guardianship here is equivalent to the cessation of reunification efforts and that challenging guardianship is more difficult than the mere grant of legal custody. Under N.C. Gen. Stat. § 7B-600(b), the court may not terminate a legal guardianship absent a showing that the relationship between the guardian and a juvenile is no longer in the juvenile’s best interest, the guardian is unfit, has neglected their duties, or is unwilling or unable to continue the guardianship. Respondent incorrectly interprets this portion of the statute. Only where guardianship is the permanent plan for the juvenile may a court not terminate the guardianship or reintegrate the minor into a parent’s home, absent a finding that the relationship between the juvenile and the guardian is no longer in the juvenile’s best interest, the guardian is unfit, negligent, or unable to continue. N.C. Gen. Stat. § 7B-600(b). The dispositional order does not make Ms. Pointer’s guardianship the permanent plan. The award of guardianship does not cease DSS’s duty to continue reunification efforts with respondent. The trial court was not required to make findings pursuant to N.C. Gen. Stat. § 7B-507(b). This assignment of error is overruled.

V. Visitation

[4] Respondent contends the trial court erred in ordering visitation between respondent and the child to be at the discretion of the person vested with physical custody of the child. We agree.

Section 7B-905 of the Juvenile Code provides in pertinent part:

Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile’s placement is continued outside the home *shall provide for appropriate visitation* as may be in the

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best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

N.C. Gen. Stat. § 7B-905(c) (2003) (emphasis supplied). Where custody is removed from a parent, the court *must* conduct a review hearing within ninety days from the date of the dispositional hearing. N.C. Gen. Stat. § 7B-906(a) (2003). At the review hearing, the court must consider and make relevant findings of fact regarding an appropriate visitation plan. N.C. Gen. Stat. § 7B-906(c)(6) (2003). The trial court maintains the responsibility to ensure that an appropriate visitation plan is established within the dispositional order. Where custody is granted to the county DSS, some discretion may be granted to the DSS director "to arrange, facilitate, and supervise a visitation plan;" however, such plan must be "expressly approved by the court." N.C. Gen. Stat. § 7B-905(c). The DSS director may also "temporarily suspend all or part of the visitation plan" but only upon "a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety." *Id.*

Here, the trial court's dispositional order failed to include an appropriate visitation plan. Instead, the trial court ordered that visitation between respondent and her child was to be allowed in the "discretion of the guardian." The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child. *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). The trial court "should not assign the granting of this privilege of visitation to the discretion of the party awarded custody of the child." *Id.* at 551-52, 179 S.E.2d at 849.

In the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised." *Id.* at

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552, 179 S.E.2d at 849. Here, the trial court's order contains no such findings of fact.

We conclude the trial court erred by failing to include an appropriate visitation plan in its dispositional order. An appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised. *See id.* The trial court may also in its order, however, grant some "good faith" discretion to the person in whose custody the child is placed to suspend visitation if such visitation is detrimental to the child. *See Woncik v. Woncik*, 82 N.C. App. 244, 250, 346 S.E.2d 277, 281 (1986) (holding that the trial court did not delegate its judicial authority by including in its custody order a provision allowing the child's custodian, upon notice to the court, to suspend a non-custodial parent's visitation privilege, pending a court hearing, if the non-custodial parent during visitation engaged in behavior detrimental to the child's welfare); *compare* N.C. Gen. Stat. § 7B-905(c) (allowing termination or suspension of visitation by the director of DSS upon "a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety"). Suspension of visitation remains subject to notice and review by the trial court.

The trial court improperly gave Ms. Pointer discretion over visitation instead of making the required findings of fact. We vacate that portion of the dispositional order and remand to the trial court for proceedings regarding visitation consistent with this opinion.

VI. Adjudication of Neglect

[5] Respondent next argues the trial court erred in concluding she had neglected the child. We disagree.

Respondent asserts acts she committed in counties other than Alamance County should not be used to make a judicial determination of neglect in Alamance County. Respondent contends the Alamance County District Court exceeded its authority when it adjudicated the child neglected based in part on alleged acts or omissions committed by her in Orange County, particularly when the Orange County DSS took no judicial action. Respondent cites no law to support this contention and we fail to find any authority to support it.

The district court has exclusive, original jurisdiction over any case involving a juvenile alleged to be abused, neglected, or dependent. N.C. Gen. Stat. § 7B-200(a) (2003). "A proceeding in which a juve-

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nile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present.” N.C. Gen. Stat. § 7B-400 (2003).

A neglected juvenile is defined as follows:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2003). “[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide ‘proper care, supervision, or discipline.’ ” *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (quoting *In re Thompson*, 64 N.C. App. 95, 101, 306 S.E.2d 792, 796 (1983)). The allegations in a petition alleging abuse, neglect, or dependency of a juvenile must be proven by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-805 (2003). In adjudicating a child neglected, a district court is not limited to considering only those circumstances occurring within its district. To hold otherwise would allow abusive and neglectful parents to avoid court intervention by simply moving from county to county.

Sufficient evidence was presented to support the trial court’s conclusion that respondent neglected the child. Respondent kept the child in a filthy room with clothes and dirty diapers strewn about. Respondent would leave the home for several days at a time. Upon her return, she would sleep for long periods of time with the child in the bed and would not awaken when the child cried. Evidence tended to show respondent came home drunk or under the influence of drugs on 7 December 2003 and attempted to remove the child from the home in the middle of the night. Respondent was unable to complete the Sunrise Substance Abuse Treatment Program because of frequent altercations with other residents. DSS presented clear, cogent, and convincing evidence from which the trial court could find and conclude the child was at risk of some physical, mental, or emotional impairment due to respondent’s failure to provide proper care and supervision for and neglected the child. This assignment of error is overruled.

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VII. Adjudication of Dependency

[6] Respondent next argues the trial court erred in concluding the child was dependent. We agree.

A finding of neglect alone is sufficient to support the trial court's decision to divest a parent of custody of their child. In order to remove a juvenile from the parents' custody the trial court must determine that the juvenile is "abused, neglected, *or* dependent." N.C. Gen. Stat. § 7B-503(a) (2003) (emphasis supplied). Throughout Chapter 7B of the Juvenile Code, the phrase "abused, neglected, *or* dependent" is stated in the disjunctive, not the conjunctive. *See, e.g.*, N.C. Gen. Stat. § 7B-200, § 7B-406, § 7B-500, § 7B-602, and § 7B-805. "In its elementary sense the word 'or,' as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately[.]" *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations and internal quotation marks omitted). Giving the statute its natural and ordinary meaning, a finding of any of the three grounds by the trial court will support its decision to continue custody of the child with Ms. Pointer. *See id.* However, respondent appeals from an adjudication of neglect *and* dependency and not a termination of her parental rights on either ground. Since these adjudications may serve as the basis for future adjudications, we address this issue.

A dependent juvenile is defined as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2003). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). The trial court made no findings of fact concerning respondent's ability to provide care or supervision for the child or that respondent lacked an alternative child care arrangement to support its conclusion the child was dependent. *Id.*

VIII. Conclusion

The trial court did not err in awarding guardianship to Ms. Pointer. We affirm the trial court's conclusion that the child is neglected. The trial court erred in awarding visitation between

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respondent and the child at the discretion of Ms. Pointer. We vacate those portions of the trial court's order awarding visitation and finding the child dependent, and remand for proceedings regarding visitation and dependency consistent with this opinion.

Affirmed in part, Vacated in part, and Remanded.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. THOMAS HENRY MYERS AND
JESSE WARREN COLEMAN, DEFENDANTS

No. COA04-567

(Filed 15 November 2005)

Homicide— second-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by granting defendants' motion to dismiss the charge of second-degree murder after the return of a verdict of guilty but before entry of judgment because, while the State's evidence raises a strong suspicion of defendants' guilt, it does not permit a reasonable inference that defendants were responsible for the death of the victim.

Appeal by the State from Order entered 20 November 2003 by Judge Robert F. Floyd, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 1 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Daniel Shatz, for defendant-appellee Myers.

Brian Michael Aus, for defendant-appellee Coleman.

HUDSON, Judge.

Defendants were tried for second-degree murder on 10 November 2003. At the close of the State's evidence and again at the close of all the evidence, defendants moved to dismiss, which motions the court denied. On 20 November 2003, the jury returned a verdict of guilty against both defendants. Before entry of judgment, defendants again

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moved to dismiss and the court granted their motion. The State appeals. We affirm the trial court's dismissal.

Defendants were tried for the murder of Tommy Lee Barrow. The State introduced evidence that Mary Ann Essell was delivering newspapers around 3:00 a.m. on 10 July 2001 when she noticed a man lying in the middle of Hopedale Road near the residence of May and Damon Herring. The man was propped up on one elbow and held up his hand. Ms. Essell thought the man was drunk and homeless. The man was black and was wearing long dark pants, a dark shirt, and an Army jacket. She did not see any blood. After looking around for police assistance, Ms. Essell left the scene to get help. She returned to the area fifteen to twenty minutes later, accompanied by her son, to look for the man, but he was gone. Ms. Essell and her son looked in the Herrings' yard and the surrounding area, but could not find him. Ms. Essell never identified Barrow as the man she saw in the road. She also testified that she saw an unidentified man in a white t-shirt riding a bicycle in the area.

Evidence also showed that during the early morning of 10 July 2001, the Herrings heard a noise outside of their home that sounded like someone or something had hit their aluminum carport. Mr. Herring turned on the outside light and saw nothing. Around 6:00 a.m., he went out to get the newspaper and noticed nothing unusual. However, later in the morning when he went outside to do yard work, he saw a black male, later identified as Tommy Lee Barrow, lying on the ground near his carport. The man had on muddy socks, boxer shorts, and a white t-shirt covered in blood on the back. His sneakers and jean shorts were on the ground nearby, as was a wallet, some scattered change, keys, a crack pipe, and a bag. No jacket was found at the scene. Mrs. Herring called the police. A deputy from the Cumberland County Sheriff's Department arrived and found no vital signs.

An autopsy of the victim revealed a stab wound in the right back, from a blow which struck his right lung and damaged the liver. The victim died as a result of both internal and external bleeding. The stab wound would not have caused instantaneous death; the victim could have moved some distance for an unspecified period of time after being stabbed. North Carolina's Chief Medical Examiner, Dr. John Butts, opined that the injury was caused by a knife or knife-like object. The autopsy also revealed a cut on the left side of the victim's face, as well as some blunt force injuries with scraped skin adjacent to the nose.

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The State's primary witness, Lisa Beeler, testified that on the afternoon of 9 July 2001, and the night of 10 July 2001, she was at the Lady Slipper trailer park, where she bought crack from defendant Coleman and got high with defendant Myers. She testified that Myers cut the crack into smaller pieces with a big knife that had brass knuckles. According to Beeler, the victim visited the trailer where Beeler was using crack several times that evening and left about 1:00 a.m. after speaking with defendant Coleman. She testified that she left the trailer park with both defendants around 3:00 or 4:00 a.m. to get more drugs. She claims that defendant Coleman told her that they were going to meet a man nearby and pick up more crack and that in the vicinity of Hopedale Road, Coleman told Myers, "There he is. There he is. Go over there and get the stuff, go talk to him." Ms. Beeler testified that she looked and saw a black man walking up the street, but she did not identify this man as the victim, as she said she could not see him well enough to tell who it was. She and Coleman waited by a bush near the corner where the Herrings live. Beeler testified that she heard loud arguing coming from the direction where Myers and the other man were located and that Coleman turned her around and told her not to look that way, saying "You don't want to see this." According to Beeler, while they were still waiting, a light came on in the Herrings' house and Coleman said he was going to go see what was taking so long. Beeler testified that after a minute or so, she heard a loud groan coming from a struggle and then silence. She began to leave when defendants ran up to her about five minutes later. When she asked what was going on, Coleman told her to shut up and be patient.

Beeler testified that when she and defendants reached an intersection with a street light, Beeler saw that Myers had dirt and what appeared to be blood on him. Coleman told Myers he better remove the bloody clothes, to go home and shower. According to Beeler, Myers told Coleman, "I got him good, didn't I cuz?", to which Coleman responded that Myers should shut his mouth and be quiet, that he needed to think. Beeler claims that as they walked, Myers was going through something that appeared to be like a wallet and that one of the defendants commented that there was no money in the wallet. When Beeler again asked what was going on, she says that Coleman told her, "Don't you want to get high? Just keep your mouth shut, or you're in like Tommy." However, Beeler testified that she believed that Coleman was referring to Tommy Myers and how dirty he was from the struggle. Coleman and Beeler returned to a friend's trailer, and when Myers got there about twenty minutes later, he had

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showered and changed into clean clothes. Beeler had made prior inconsistent statements to the police, but when questioned about this at trial, she stated that after she learned of the victim's death and realized what had happened, that she came forward.

Our review of a trial court's ruling on a motion to dismiss is the same regardless of whether the motion is made at the close of the State's evidence, at the close of all the evidence, after return of a verdict of guilty and before entry of judgment, or after discharge of the jury without a verdict and before the end of the session. *State v. Scott*, 356 N.C. 591, 595-96, 573 S.E.2d 866, 868 (2002). In reviewing the trial court's ruling, we must evaluate the evidence in the light most favorable to the State. *State v. Molloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). All contradictions must be resolved in favor of the State. *Id.* The ultimate question is "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). As long as the evidence supports a reasonable inference of defendant's guilt, it is up to the jury to decide whether there is proof beyond a reasonable doubt. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). This is true regardless of whether the evidence is direct or circumstantial. *Id.* However, if the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Molloy*, 309 N.C. at 179, 305 S.E.2d at 720 (internal citation omitted). "This is true even though the suspicion aroused by the evidence is strong." *Id.* (internal citation omitted).

As noted by other courts faced with this issue, the rules regarding a determination of sufficiency of the evidence are easier to state than to apply and require a case-by-case analysis. *See, e.g., State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967); *State v. Davis*, 74 N.C. App. 208, 213, 328 S.E.2d 11, 15, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985); *State v. Bell*, 65 N.C. App. 234, 236, 309 S.E.2d 464, 466 (1983), *aff'd*, 311 N.C. 299, S.E.2d 72 (1984). After an exhaustive review of the record, we conclude that while the State's evidence raises a strong suspicion of defendants' guilt, it does not permit a reasonable inference that defendants were responsible for the death of the victim.

Our conclusion is guided, in part, by several instructive cases. In *State v. Cutler*, the State offered evidence that on the same day as the murder, a truck similar to defendant's was seen at the victim's house and defendant was seen drunk and "bloody as a hog" with a large

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gash on his head about 500 yards from the victim's house. 271 N.C. at 381, 156 S.E.2d at 681. Defendant was also found in possession of a knife with both human blood and a hair "similar" to the chest hair of the victim on it. *Id.* at 384, 156 S.E.2d at 682. Nevertheless, the Court held that the evidence was insufficient, noting that the State's evidence did not show any blood from the deceased on "the person, clothing, knife or vehicle" of the defendant and that the testimony regarding the chest hair was inconclusive. *Id.* at 384, 156 S.E.2d at 682.

[The evidence was] sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture. It may reasonably be inferred that the defendant was at the home of the deceased when the deceased came to his death, or shortly thereafter. However, it is not enough to defeat the motion for nonsuit that the evidence establishes that the defendant had an opportunity to commit the crime charged.

Id.

In *State v. Bell*, defendant was arrested near the scene of a murder near the time of the crime in clothes similar to those worn by a man spotted at the scene. 65 N.C. App. at 234-35, 309 S.E.2d at 465-66. He had blood on his clothing, and bloodstains consistent with defendant's blood type, but inconsistent with the victim's, were found inside the victim's apartment. *Id.* When arrested, defendant had keys which fit the victim's door and post office box. *Id.* Police recovered a ten-inch dagger near the scene of the arrest and a sheath which fit this knife was found in the victim's apartment. *Id.* In reversing the trial court's denial of defendant's motion to dismiss, the Court held that this evidence was too "tenuous" and "nebulous," concluding that at most, it established that defendant had the opportunity to kill the victim. *Id.* at 241, 309 S.E.2d at 465. The Court concluded that the evidence regarding the knife and sheath was "too tenuous to be considered as substantial proof of anything" because it required first inferring that the knife belonged to defendant because it was found near where he was apprehended, and then also inferring that the knife found belonged to the sheath found in the victim's apartment. *Id.*

Other courts have also refused to permit "double inferences." In *State v. Chapman*, the evidence tended to show that the victim was shot in the back by a shotgun and that defendant lived nearby and had recently been acquitted of robbery charges brought by the victim. 293

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N.C. 585, 586, 238 S.E.2d 784, 785 (1977). Shortly after the shooting, police recovered a shotgun from defendant and the gun carried a strong odor of gun powder. *Id.* A spent shell recovered from an alleyway between defendant's home and where the victim was shot was found to have been fired from defendant's gun and was introduced into evidence at trial. *Id.* However, the Court held that while there was "strong evidence," it was "not adequate to support the double inference that: (1) the victim was shot with defendant's gun; and (2) defendant fired the shot." *Id.* at 587, 238 S.E.2d at 786. The Court opined:

The most the State has shown is that the victim could have been shot by a shell fired from defendant's gun. There is nothing, other than an inference which could arise from mere ownership of the gun, that would tend to prove that defendant actually fired the shot. Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do. Even when the State's evidence is enough to raise a strong suspicion, if it is insufficient to remove the case from the realm of conjecture, non-suit must be allowed.

Id. at 587-88, 238 S.E.2d at 786 (internal citation and quotation marks omitted). (*See also Davis*, 74 N.C. App. at 212-15, 328 S.E.2d at 15-16 (holding that evidence that the victim's keys were found in an area where the police had found defendant sleeping eight hours prior required impermissible "building of inferences" to reach conclusion that defendant killed victim: that defendant dropped the keys and also that he obtained the keys from her home and killed her in the process).

We conclude that as in *Cutler* and *Bell*, the evidence here establishes at most that defendants had the opportunity to commit the crime. Although the facts here raise a strong suspicion, as in *Bell*, *Davis*, and *Chapman*, the evidence requires a double inference to find defendants guilty. Taking the testimony in the light most favorable to the State, the evidence tends to establish that: defendants were in the vicinity of the Herring residence sometime in the early morning of 10 July 2001, that the victim's body was found in this vicinity several hours later, that defendants argued and struggled with an unidentified individual who groaned at one point during the struggle, and that defendant Myers appeared to have blood and dirt on his shirt after the struggle. We note that none of the State's witnesses identified the victim Barrow as the man involved in the struggle with defendants, or as the man Mary Ann Essell saw in the road near the

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Herring residence. Furthermore, there was testimony indicating that there were other unidentified males in the area around the same time the murder is alleged to have occurred. In order to find that defendants killed the victim, the jury must first infer that the unidentified individual with whom the defendants struggled was the dead man found later, and building upon that inference, that the struggle was what led to the victim's death. Since "[e]very inference must stand upon some clear and direct evidence," and the latter inference does not, we conclude that the trial court correctly granted defendant's motion to dismiss. *Davis* at 212, 328 S.E.2d at 15.

Affirmed.

Judges WYNN and STEELMAN concur.

SUSAN M. FERGUSON AND MICHAEL D. FERGUSON, PLAINTIFFS V. DDP PHARMACY, INC., MAURICE LYNCH, PENNY ROSE, AND DEBBIE LYLES, DEFENDANTS

No. COA05-204

(Filed 15 November 2005)

1. Appeal and Error— appealability—motion to disqualify counsel

An order granting a motion to disqualify counsel is immediately appealable.

2. Attorneys— disqualification as counsel—discretion of judge

The decision to disqualify counsel is discretionary with the trial judge and is not generally reviewable, absent abuse of discretion.

3. Attorneys— disqualification of firm—conflict of interest

The trial court did not abuse its discretion by disqualifying counsel under the North Carolina Rules of Professional Conduct where one partner in a firm represented plaintiff in a criminal matter involving forged prescriptions, and another partner in the same firm attempted to represent defendant in a civil action by plaintiff alleging malicious prosecution and other claims. Rules of Professional Conduct 1.9 and 1.10.

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Appeal by defendant DDP Pharmacy, Inc. from order entered 17 November 2004 by Judge Quentin T. Sumner in Halifax County Superior Court. Heard in the Court of Appeals 19 October 2005.

Poyner & Spruill L.L.P., by J. Nicholas Ellis, for plaintiffs-appellees.

Chichester & Walker, PC, by Gilbert Chichester and Haywood, Denny & Miller, L.L.P., by John R. Kincaid, for defendant-appellant.

No brief filed for defendants-appellees Maurice Lynch, Penny Rose, and Debbie Lyles.

TYSON, Judge.

DDP Pharmacy, Inc. (“defendant”) appeals from order entered disqualifying attorney Gilbert W. Chichester (“Chichester”) from serving as attorney for defendant. We affirm.

I. Background

Pharmacy technicians, Debbie Lyles and Penny Rose, were working in the Roanoke Rapids Drugco Pharmacy when an individual came in and attempted to pick up a prescription for Oxycontin, a Schedule II controlled substance under the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-113.3 (2003). The individual left without being detained or questioned. The employees called the police. One of the employees identified the individual who came into the store as Susan M. Ferguson (“plaintiff”).

Following the employee’s identification of plaintiff as the suspect, Detective W.F. Bowens (“Detective Bowens”) of the Roanoke Rapids Police Department contacted plaintiff on 4 February 2002. Plaintiff agreed to meet at the police department with Detective Bowens, who informed her that a Drugco employee had identified her as the individual who attempted to pick up a forged prescription for Oxycontin. Plaintiff denied any involvement and was not immediately charged with any crime following her meeting with Detective Bowens.

On 5 February 2002, plaintiff contacted attorney Turner Stephenson (“Stephenson”), a partner with Chichester, Walker & Stephenson. Plaintiff told Stephenson a Drugco employee had identified her as the suspect who had attempted to pickup a forged prescription. Stephenson advised plaintiff to avoid further contact with

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the Roanoke Rapids Police Department. Stephenson told plaintiff he would contact Police Captain Moody and inform him plaintiff was consulting with Stephenson and that she would have no further contact with the department. Stephenson also advised plaintiff that he would request that no additional action be taken by the Roanoke Rapids Police Department against plaintiff.

Plaintiff met with Stephenson at his office on 8 February 2002. At that meeting, Stephenson informed plaintiff that one of his law partners was representing Donna Rogers who had been criminally charged in connection with the same incident regarding a forged prescription. Stephenson advised plaintiff he could not further represent her. Stephenson is no longer a partner with Chichester, Walker & Stephenson.

On 28 February 2002, plaintiff was charged with attempting to obtain a controlled substance by means of forgery or fraud. Plaintiff was taken into custody, photographed, and fingerprinted.

In July 2002, at the criminal trial, none of the Drugco employees identified plaintiff as the individual who attempted to pickup the prescription on 26 January 2002. The State voluntarily dismissed all charges against plaintiff on 8 July 2002.

On 3 May 2003, plaintiff and Michael M. Ferguson (collectively, "plaintiffs") filed a complaint in Halifax County Superior Court against defendant and several of its employees. Plaintiffs asserted causes of action for malicious prosecution, intentional or reckless infliction of emotional distress, slander, negligence, punitive damages, and loss of consortium.

Plaintiffs filed a notice of voluntary dismissal regarding defendants: Drugco Discount Pharmacy, David Smith, Steve Bass, Gene Minton Consulting Service Inc., and GWM, Inc. On 5 December 2003, defendants filed a motion for summary judgment. The trial court granted summary judgment for defendants Gene W. Minton and Sybil Minton concerning all of plaintiffs' claims and for all defendants regarding plaintiffs' claim for slander.

On 30 September 2004, Chichester served a notice of appearance on behalf of defendant. On 15 October 2004, plaintiffs moved to disqualify Chichester because of his firm's prior representation of plaintiff in a related matter. The trial court granted plaintiffs' motion to disqualify Chichester on 17 November 2004. Defendant appeals.

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II. Issues

Defendant argues the trial court erred by entering an order disqualifying Chichester as defendant's attorney on the grounds that: (a) there was no prior representation of plaintiff by Chichester's firm; (b) Chichester and his firm acquired no protected or material information about plaintiff; (c) there is no conflict of interest sufficient to require Chichester's disqualification as a matter of law; and (d) the court's ruling was otherwise contrary to the provisions of the Rules of Professional Conduct.

III. Interlocutory Appeal

[1] Generally, there is no right of immediate appeal from interlocutory orders and judgments. The North Carolina General Statutes set out the exceptions under which interlocutory orders are immediately appealable. N.C.G.S. § 1-277(a) provides: "an appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding."

Goldston v. American Motors Corp., 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Our Supreme Court has held that an order granting a motion to disqualify counsel is immediately appealable. *Id.* at 727, 392 S.E.2d at 737 ("[O]nce the attorney was admitted under the statute, [the client] acquired a substantial right to the continuation of representation by that attorney—just as with any other attorney duly admitted to practice law in the State of North Carolina . . . Thus, when the trial court's order disqualifying counsel was entered, [the client] correctly moved to appeal that decision immediately before proceeding with further discovery and the trial."). Defendant's appeal is properly before this Court.

IV. Standard of Review

[2] This court has stated absent a showing of an abuse of discretion, a decision regarding whether to disqualify counsel "is discretionary with the trial judge and is not generally reviewable on appeal." *In re Condemnation of Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764-65, *disc. rev. denied*, 320 N.C. 513, 358 S.E.2d 520 (1987). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (quoting *White v. White*, 312

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N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998).

V. Rules of Professional Conduct

[3] Defendant argues the trial court erred when it granted plaintiffs' motion to disqualify Chichester from representing defendant under Rule 1.9(a) of the North Carolina Revised Rules of Professional Conduct.

Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

North Carolina Revised Rules of Professional Conduct, Rule 1.9(a) (2005).

For plaintiff to prevail on her claim that Chichester's representation of defendant violated Rule 1.9(a) she had to show: (1) an attorney-client relationship existed between Stephenson and her regarding her criminal charges; (2) the civil lawsuit is the same as or a substantially related matter to the criminal case; and (3) defendant's position is materially adverse to plaintiff's interest. *Id.*

A. Representation

Whether an attorney-client relationship existed between plaintiffs and defendants is a question of fact for the trial court and "our appellate courts are bound by the trial court's findings of facts where there is some evidence to support these findings, even though the evidence might sustain findings to the contrary."

Cornelius v. Helms, 120 N.C. App. 172, 175, 461 S.E.2d 338, 339-40 (1995) (quoting *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984)).

While the record does not show a financial arrangement between plaintiff and Stephenson, this court has stated the attorney-client relationship "may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract." *Id.* at 175, 461 S.E.2d at 340 (quoting *The North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 338 (1985)).

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The ethics commentary following Rule 1.9 notes that a free consultation may in fact create an attorney-client relationship. The question is “whether defendant’s conduct was such that an attorney-client relationship could reasonably be inferred” by the purported client. *Sheffield*, 73 N.C. App. at 358, 326 S.E.2d at 325.

Plaintiff contacted Stephenson, a partner with Chichester, Walker & Stephenson, on 5 February 2002, seeking legal advice concerning potential criminal charges after meeting with and being questioned by a police officer. Stephenson advised her to have no further contact with the police. Stephenson also advised plaintiff that he would contact Police Captain Moody and inform the police department that plaintiff would have no further contact with the police. Stephenson scheduled a time for plaintiff to meet and met her at his law office. At that meeting, Stephenson told plaintiff he could no longer represent her because his law partner was representing another client charged in the incident. Sufficient evidence was presented from which the trial court could find and conclude an attorney-client relationship was formed between plaintiff and Chichester, Walker & Stephenson.

B. Related Matter

Rule 1.9(a) prohibits representation of an adverse client in a matter that is the same, or substantially related to, that of a former client. Rule 1.9, Comment 2 states, “[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.”

Stephenson represented plaintiff in the case involving forged prescriptions. Stephenson agreed to call the police on plaintiff’s behalf to inform them she would have no further contact with the department. Stephenson met with plaintiff at his office and informed her he could not further represent her because a law partner represented another defendant charged in the same incident.

After the criminal case was dismissed, plaintiff filed a civil suit arising from the same operative facts as the criminal case. By purporting to represent defendant in the civil suit by plaintiff, a former client, a court could find Chichester is changing sides in the matter. Rule 1.9, Comment 2 prohibits Chichester from “a changing of sides” to defend plaintiff’s claims.

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C. Materially Adverse Position

According to Rule 1.9, a new client's interests must not be materially adverse to the interests of a former client. Even if the representing attorney leaves the firm, Rule 1.9, Comment 6 states, "[a] lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients."

Plaintiffs named defendant in their civil suit and sought damages for several causes of action. Defendant denies any liability to plaintiffs. Plaintiffs' interests are materially adverse to defendant's interests. Even though Stephenson is no longer a partner with Chichester, Walker & Stephenson, nothing in the record shows the remaining lawyers in the firm, Chichester included, were not privy to confidential information about plaintiffs and the facts giving rise to the case while Stephenson represented plaintiff. According to Rule 1.9, Comment 6, "the burden of proof should rest upon the firm whose disqualification is sought" to prove the information about plaintiff was not shared with other members of the firm. Nothing in the record shows the firm met this burden. Defendant has failed to demonstrate any abuse of discretion in the trial court's ruling.

D. Rule 1.10(b)

Defendant argues that since Stephenson is no longer a partner with Chichester, Walker & Stephenson, the trial court improperly granted plaintiffs' motion under Rule 1.9. Defendant contends the proper rule to apply is Rule 1.10(b) of the North Carolina Revised Rules of Professional Conduct.

Rule 1.10(b) states:

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

North Carolina Revised Rules of Professional Conduct, Rule 1.10(b)(1)-(2) (2005).

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Chichester's representation of defendant could violate Rule 1.10(b), as well as Rule 1.9(a). Stephenson represented plaintiff while he was a partner at Chichester, Walker & Stephenson. Stephenson gave plaintiff legal advice regarding her conduct and interaction with the police department. He assured plaintiff he would inform the police on her behalf that she would have no further contact with them and scheduled a time to meet with plaintiff to discuss the case.

The facts involved in the two cases are "substantially related." Rule 1.10(b)(1). The underlying reason plaintiffs filed suit against defendant was because plaintiff anticipated and later was in fact charged with criminal acts for which she specifically consulted with Stephenson. From these facts, a court could reasonably find and conclude that Chichester's representation of defendant would violate plaintiff's attorney-client privilege.

Rule 1.10(b)(2) prohibits representation of a client whose interests are adverse to a former lawyer's client's interests when "any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter." The burden rests upon the law firm to prove the former attorney did not share any information about the former client with the remaining attorneys in the firm. Rule 1.9, Comment 6. Rule 1.10, Comment 2 states, "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client"

The information plaintiff shared with Stephenson was confidential. She had been investigated for, questioned about, and was aware of potential of criminal charges for attempting to possess scheduled narcotics on a forged prescription. Plaintiff shared this information with Stephenson in confidence. The law firm bore the burden to prove Stephenson did not share the confidential information with the other members of the firm. The record is devoid of such evidence. Defendant failed to show any abuse of discretion in the trial court's ruling. This assignment of error is overruled.

IV. Conclusion

Chichester, Walker & Stephenson represented plaintiff in the criminal matter involving forged prescriptions. Under either Rule 1.9 or Rule 1.10, the trial court's grant of plaintiffs' motion to disqualify Chichester from representing defendant in the related civil matter was proper. The law firm failed to prove that Stephenson did not share plaintiff's confidential information with the other members of

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the firm. Rule 1.9, Comment 6. Defendant failed to show the trial court abused its discretion to warrant reversal of its order. The trial court's order is affirmed.

Affirmed.

Judges JACKSON and JOHN concur.

MMR HOLDINGS, LLC, AND TOWN & COUNTRY FORD, INC., PETITIONERS v. CITY OF CHARLOTTE AND THE CHARLOTTE ZONING BOARD OF ADJUSTMENT, RESPONDENTS

No. COA04-1618

(Filed 15 November 2005)

Zoning— definition of facade—alteration of nonconforming sign

An order that a nonconforming sign be removed because more of the facade of the building had been altered than a city zoning ordinance allowed was remanded for determination of a reasonable definition of “facade” consistent with the city’s intent in passing the ordinance and with the use of the word throughout the ordinance. The zoning board of adjustment may then determine the extent of facade alteration in this case.

Appeal by petitioners from order entered 1 September 2004 by Special Superior Court Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2005.

James, McElroy & Diehl, P.A., by Richard B. Fennell, for petitioners-appellants.

Office of the City Attorney, by Assistant City Attorney Terrie V. Hagler-Gray, for respondents-appellees.

GEER, Judge.

The sole issue raised in this appeal by petitioners MMR Holdings, LLC and Town & Country Ford, Inc. (collectively “T&C”) is the proper construction of the word “facade” in the zoning ordinance of the City of Charlotte. Because both the Charlotte Zoning Board of Adjustment

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(the “Board”) and the superior court defined the term “facade” in a manner that is at odds with the term’s plain and ordinary meaning, we reverse and remand for further proceedings.

Facts

T&C has operated an automobile dealership for many years on leased property in Charlotte, North Carolina currently owned by MMR Holdings, LLC. One of the features of T&C’s dealership is a large sign stating the name of the dealership, which stretches across the top of a 40-foot deep, eight-foot thick canopy attached to the front of the dealership building. The canopy has been in place since the late 1970s and extends the width of the building.

A provision of the City’s zoning ordinance specifically prohibits roof signs. *Charlotte, N.C., Code* § 13.105 (2004). It is undisputed that the sign on T&C’s canopy violates this prohibition. The City’s zoning ordinance, however, permits nonconforming roof signs erected prior to 1 February 1988—as T&C’s sign was—to remain until there are “[s]tructural or nonstructural alterations excluding routine maintenance and repair of the facade of the principal building that exceed 50% of the facade’s area.” At that time, any non-conforming sign must be removed or brought into compliance with the ordinance. *Charlotte, N.C., Code* § 13.112(1)(a), .112(1)(b)(3) (2004).

In spring 2003, T&C remodeled portions of the interior and exterior of its dealership. Among other changes, this remodel included the complete replacement of the Plexiglas surrounding the canopy with new lukabond paneling. Subsequent to T&C’s remodel, the Zoning Code Enforcement Inspector cited T&C for violating the prohibition on roof signs. The inspector took the position that T&C’s remodel constituted an alteration of more than 50% of the facade of the principal building and, therefore, voided the legal nonconforming status of T&C’s sign. The inspector ordered T&C to remove the sign.

T&C appealed the citation to the Board. The Board found in pertinent part:

3. A facade is defined in The American Heritage Dictionary as “a face of a building; especially, such a face that is given distinguishing treatment. The face or front part of anything[;] especially, an artificial or false front.”
4. A canopy is defined in Section 13.102 of the [City’s zoning ordinance] as “a permanent structure other than an awning made

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of cloth, metal or other material attached or unattached to a building for the purpose of providing shelter to patrons or automobiles, or as a decorative feature on a building wall.”

5. The extreme width of the canopy attached to [T&C’s] building separates the glass front of the building from the new *artificial or false front* on which [T&C] has placed the new signage. . . .
6. The front of the canopy to [T&C’s] building *is the facade of the building*.

(Emphases added.) Based upon these findings, the Board concluded that T&C lost its “legal nonconforming status . . . when it structurally altered more than 50%” of the front of the canopy during T&C’s remodel. The Board, therefore, affirmed the inspector’s decision.¹

Pursuant to N.C. Gen. Stat. § 160A-388 (2003), T&C filed a petition for writ of certiorari in the Mecklenburg County Superior Court, seeking review of the Board’s decision. The court granted T&C’s petition, concluded that the Board’s construction of the word “facade” in the City’s ordinance was not unreasonable, and affirmed the Board’s decision. T&C filed a timely notice of appeal to this Court.

Discussion

To review the decision of a zoning board, a superior court must determine what type of error the petitioner asserts. *In re Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998). When the petitioner claims that the municipality’s conclusions were either unsupported by the evidence or arbitrary and capricious, the appropriate standard of review is the “whole record” test. *Id.* On the other hand, if the petitioner correctly contends that the agency’s decision was based on an error of law, *de novo* review is required. *Id.*

On an appeal from a superior court’s review of a zoning board decision, the scope of our review is limited to determining whether the trial court exercised the appropriate standard of review and, if so, deciding if the trial court did so properly. *Harding v. Bd. of Adjustment of Davie County*, 170 N.C. App. 392, 395, 612 S.E.2d 431, 434 (2005). Our standard of review is the same as that of the superior court. *Id.*

1. We note that the Board also addressed citations regarding the number and location of flags at T&C’s dealership. The Board’s determinations on those issues have not, however, been appealed to this Court.

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Here, the outcome of the case turns on the proper construction of the word “facade” and, therefore, involves solely a question of law that we consider *de novo*. *Tucker v. Mecklenburg County Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *aff’d in part per curiam, disc. review improvidently allowed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003). The essential goal in construing an ordinance is to determine the intent of the municipality’s legislative body. *Knight v. Town of Knightdale*, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004). Accordingly, the rules applicable to the construction of statutes also apply to the construction of municipal ordinances. *Id.*

When a word is not otherwise defined in an ordinance, we should give the term “its plain and ordinary meaning.” *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). Courts “are permitted to look beyond the language of [an] ordinance only when it contains some ambiguity.” *Procter v. City of Raleigh Bd. of Adjustment*, 140 N.C. App. 784, 786, 538 S.E.2d 621, 622 (2000).

The word “facade” is not defined in the City’s zoning ordinance and the parties do not assert its use is ambiguous. In order to determine the term’s plain and ordinary meaning, the Board referred to a dictionary.² As set out in its findings of fact, the Board adopted an edited version of the definition included in *The American Heritage Dictionary*. The full definition of “facade” contained in *American Heritage* is:

1. *Architecture*. A face of a building; especially, such a face that is given distinguishing treatment: “*Pink classical facades peeled off and showed the mud beneath*” (Graham Greene).
2. The face or front part of anything; especially, an artificial or false front: “*Of most famous people we know only the imposing facade*” (Edith Hamilton).

The American Heritage Dictionary of the English Language 468 (10th ed. 1981).

2. While not an exclusive solution, this Court has referred to dictionaries to help determine the plain and ordinary meaning of words in statutes and ordinances that are unambiguous and otherwise undefined. See *Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment*, 169 N.C. App. 587, 590, 610 S.E.2d 255, 258 (2005) (consulting a dictionary in determining the plain and ordinary meaning of “building”); *Patel v. Stone*, 138 N.C. App. 693, 695, 531 S.E.2d 879, 881 (consulting a dictionary in determining the plain and ordinary meaning of “right”), *disc. review denied*, 353 N.C. 267, 546 S.E.2d 109 (2000).

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Of the two definitions set out in the *American Heritage*, the Board bypassed the first, which applies to architecture, in favor of the second. Based upon the second definition, the Board concluded that the front of T&C's canopy was an "artificial or false front" and was, therefore, the facade of the entire building. The first definition relating to architecture was, however, more applicable to a decision regarding what portion of a building constitutes its facade. Moreover, the explanatory sentence—edited out by the Board—uses the term in the context of a physical structure: "*Pink classical facades peeled off and showed the mud beneath.*"

By contrast, the second definition, which was relied upon by the Board in reaching its decision, defines facade more generally as the "face or front part of anything." Unlike the first definition, it does not specifically relate to buildings or architecture. Indeed, the corresponding explanatory sentence—omitted by the Board—suggests that using the term to designate an "artificial or false front," critical language for the Board's decision, is inapposite in the building or architectural context: "*Of most famous people we know only the imposing facade.*" The second more generally applicable definition of "facade" frequently is used in a metaphorical, rather than physical, sense. The Board's reliance on the second definition rather than the architectural definition was unreasonable. Reference to *Webster's Third New International Dictionary* ("*Webster's*") supports our view that *American Heritage's* first definition is more pertinent to the proper construction of the ordinance. *Webster's* defines "facade" as "the front of a building[;] . . . a face . . . of a building that is given emphasis by special architectural treatment" *Webster's Third New Int'l Dictionary* 811 (1968).

Applied to T&C's dealership, the definitions in both *American Heritage* and *Webster's* suggest that the facade is *at least* the entire side of the building to which the canopy, being the special or distinguishing architectural treatment, is attached. Given these definitions, a facade cannot be merely the front of any special architectural treatment, as the Board found. We, therefore, conclude it was error for the Board to determine that the facade of T&C's entire building consisted solely of the eight-foot thick strip across the front of T&C's canopy.

The definitions of both "face" and "front" support our determination that the Board's definition of facade was unreasonable. Both words feature prominently in the *American Heritage* and *Webster's* definitions of "facade." "Face" is defined as:

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[A] front, upper, or outer surface or a surface presented to view or regarded as principal: as a: the front of anything having two or four sides—opposed to *back*; usu. distinguished from *side* b: the facade esp. of a building

Id. Similarly, “front” is defined as something that confronts or faces forward, including “a face of a building; *esp.* the face that contains the principal entrance” *Id.* at 914. Thus, the “face” or “front” of a building includes the principal side that is presented to view or contains the principal entrance. Indeed, even the City notes in its brief that T&C has a canopy “attached to the glass *front*” of its building. (Emphasis added.)

We also observe that other portions of the City’s ordinance use the terms “facade” and “canopy” in a manner that counsels against affirming the Board’s interpretation of the words in this case. A court “does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004).

Use of the term “facade” throughout the rest of the ordinance suggests an intention that the word be construed more broadly than as merely the front of a canopy. For example, in a section addressing urban design standards, the ordinance states that all “buildings fronting directly on a street shall be designed so that the *first floor street facade* of the building(s) along all streets *includes clear glass windows and doors*” *Charlotte, N.C., Code* § 9.1209(1)(a) (2004) (emphases added). Several subsections later the ordinance states that a “blank wall [can be] a facade” and that emergency exit doors may be located on facades only if the doors are “decorative and part of the overall building design.” *Charlotte, N.C., Code* § 9.1209(1)(d), (f). Similarly, in a section addressing multifamily dwellings, the ordinance states that certain buildings “must have the building elevation facing the street as a *front architectural facade with an entrance doorway.*” *Charlotte, N.C., Code* § 9.303(18)(f)(iv) (2004) (emphasis added). The requirements in these sections that facades have windows, doorways, and decorative architecture cannot be reconciled with the Board’s interpretation in this case that the facade includes the decorative architecture, but not the dealership’s glass front and entranceway.

By comparison, the ordinance’s further use of the term “canopy” never demonstrates any intention by the City to have it subsume the

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term “facade.” In another section, the ordinance states that canopies “*and similar appurtenances* are encouraged at the entrances to buildings” *Charlotte, N.C., Code* § 10.804(1)(c) (2004) (emphasis added). Thus, a “canopy” in § 10.804(1)(c) is an appurtenance to the face of a building—not a facade in and of itself. Indeed, even the ordinance chapter addressed in this appeal states that “[c]anopies and awnings shall not be calculated in the total square footage of a building wall.” *Charlotte, N.C., Code* § 13.108(2) (2004). The Board’s interpretation would require removing a building’s “facade” from the calculation of a building wall’s square footage since under the Board’s definition, the facade would merely be the front of the canopy, which is explicitly excluded from the calculation. We do not think this odd result was intended by the City when passing the ordinance. *Variety Theatres, Inc. v. Cleveland County*, 282 N.C. 272, 275, 192 S.E.2d 290, 292 (1972) (“In construing any statute or ordinance the court will avoid an interpretation which would lead to absurd results.”), *appeal dismissed*, 411 U.S. 911, 36 L. Ed. 2d 303, 93 S. Ct. 1548 (1973).

While we have rejected the Board’s interpretation of the word “facade” in the decision below, we recognize that one of the functions of a board of adjustment is to interpret its own local zoning ordinance, and its interpretations are owed some deference. *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjustment*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999). We, therefore, decline to consider T&C’s position that its “facade” included all faces of the building that the public can see. While that is a reasonable interpretation of the word “facade,” it would equally be reasonable to limit “facade” to the front of the building. We remand this case to the superior court to remand to the Board to determine in the first instance what reasonable definition of “facade” is most consistent with the City’s intention in passing the ordinance and with the use of the word “facade” throughout the ordinance. *Cf. Coscan Washington, Inc. v. Maryland-Nat’l Capital Park & Planning Comm’n*, 87 Md. App. 602, 628, 590 A.2d 1080, 1092 (holding that a planning board was reasonable in its chosen definition of “facade”), *cert. denied*, 324 Md. 324, 597 A.2d 421 (1991). Once the Board has defined “facade” in this manner, it may then determine which of the walls of T&C’s dealership are part of the facade and whether more than 50% of the facade was altered in T&C’s remodel.

Reversed and remanded.

Judges CALABRIA and ELMORE concur.

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STATE OF NORTH CAROLINA v. TIMOTHY DANIEL LOCKLEAR

No. COA 04-1621

(Filed 15 November 2005)

1. Criminal Law— judgment out of term—failure to set forth formal order in minutes—sufficiency of statements to extend court session

The trial court did not err in a second-degree sexual offense case by entering its judgment out of term, because: (1) although the record does not contain a written order specifically referencing N.C. Gen. Stat. § 15-167 and stating that the session was extended thereunder, there are sufficient statements made by the trial court in the record to comply with N.C. Gen. Stat. § 15-167 and to effectively extend the court session; and (2) while the better practice for the trial court would have been to expressly set forth in the minutes a formal order extending the court session, the trial court, in making repeated announcements in open court without objection from defendant, satisfied N.C. Gen. Stat. § 15-167.

2. Evidence— prior crimes or bad acts—sexual harassment of other inmates

The trial court did not commit plain error in a second-degree sexual offense case by admitting testimony that defendant had sexually harassed other inmates in the Brunswick County jail, because: (1) defendant failed to show that the jury probably would have reached a different result had the evidence of prior bad acts not been admitted; and (2) the jury's failure to find an additional element of first degree sexual offense does not in itself show that the jury doubted that defendant engaged in a sexual act with the victim by force and against the victim's will.

Appeal by defendant from judgment dated 12 July 2004 by Judge Jack W. Jenkins in Superior Court, Brunswick County. Heard in the Court of Appeals 14 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Daniel S. Johnson, for the State.

Jeffrey Evan Noecker for defendant.

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McGEE, Judge.

Timothy Daniel Locklear (defendant) was convicted of second-degree sexual offense and was sentenced to a minimum term of 168 months in prison, to begin at the expiration of the sentences defendant was serving at the date of trial.

The State's evidence at trial tended to show that on 5 September 2003, defendant was incarcerated in the Brunswick County jail. Defendant was moved into a cell occupied by Joshua Zack (Zack), James Rash (Rash), and two other inmates. Zack slept on a mat on the cell floor and defendant slept in a bunk bed. During the evening of 5 September 2003, while the other cellmates were sleeping, defendant invited Zack onto defendant's bed. Zack and defendant sat on defendant's bed drawing with a pencil.

Zack testified that defendant pressed the pencil behind Zack's right ear and demanded that Zack perform oral sex on defendant. Zack complied. Defendant also had anal sex with Zack, after which Zack got down from the bunk and struck defendant in the mouth. A fist fight ensued, and the other cellmates awoke. Defendant told Zack not to tell anyone about what had occurred. Zack reported the incident to a prison guard two days later.

Rash testified that on 5 September 2003, he shared a cell with defendant and Zack. Rash awoke during a fight between defendant and Zack. Rash heard Zack say "[n]o" and noticed that Zack's pants were down. Rash testified that he heard defendant tell Zack that if Zack "said anything about what [had] happened that [defendant would] kill [Zack]." Rash later heard defendant brag about raping Zack. Rash also testified that he had seen defendant harass another young inmate by pulling down that inmate's pants.

After the assault was reported, Zack was removed from the cell and James Burriss (Burriss) took Zack's place. Burriss testified that defendant bragged about using a pencil to force Zack to engage in sexual acts. Burriss also testified that defendant forced an inmate who was "not very mentally stable" to dance naked on a table.

Benny Narem (Narem), another inmate, heard defendant on 6 September 2003 brag about "rap[ing] the guy . . . named Zack" and forcing Zack to perform oral sex. Narem also testified that he had seen defendant harass the same young inmate to whom Rash had referred. Narem saw defendant touch the young inmate in a sexual manner.

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Defendant testified that on 5 September 2003 Zack offered to perform oral sex on defendant. Defendant described the fight between himself and Zack as a fight over Zack not paying for some cookies. Defendant denied using force or a pencil against Zack and denied having anal sex. On cross-examination, defendant admitted making several false statements to the investigating detective and admitted to prior criminal convictions.

I.

[1] Defendant's first assignment of error is that the trial court entered its judgment out of term. Defendant argues that the trial court failed to enter an order extending court after the session was scheduled to expire on 9 July 2004. As a result, defendant argues, the judgment is null and void and must be vacated. We disagree.

A trial court's extension of a session of court is governed by N.C. Gen. Stat. § 15-167 (2003), which provides:

Whenever a trial for a felony is in progress on the last Friday of any session of court and it appears to the trial judge that it is unlikely that such trial can be completed before 5:00 P.M. on such Friday, the trial judge may extend the session[.] . . . Whenever a trial judge continues a session pursuant to this section, *he shall cause an order to such effect to be entered in the minutes*, which order may be entered at such time as the judge directs, either before or after he has extended the session.

N.C.G.S. § 15-167 (emphasis added).

In *State v. Harris*, 181 N.C. 600, 107 S.E. 466 (1921), our Supreme Court addressed what a trial court must do to issue an order "continuing the trial of the cause after the expiration of the term by limitation."¹ *Harris*, 181 N.C. at 607, 107 S.E. at 469. The Supreme Court determined that "the statute was complied with by the daily entries on the docket: 'Pending the trial of the case of *S. v. J.T. Harris*, the court takes a recess until 9:30 tomorrow,' and the entry next day,

1. *Harris* was decided under section 4637 of the Consolidated Statutes of 1919, which provided:

In case the term of a court shall expire while a trial for felony shall be in progress and before a judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case, and he may in his discretion exercise the same power in the trial in any cause in the same circumstances except civil actions begun after Thursday of the last week. *Harris*, 181 N.C. at 607, 107 S.E. at 469 (quoting C.S. 4637).

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‘Court convened at 9:30 a.m. pursuant to recess,’ etc., in regular form.” *Id.* at 607, 107 S.E. at 470.

In this case, the felony trial was not completed on Friday, 9 July 2004. The record does not contain a written order specifically referencing N.C. Gen. Stat. § 15-167 and stating that the session was extended thereunder. However, there are sufficient statements made by the trial court in the record to comply with N.C. Gen. Stat. § 15-167 and to effectively extend the court session. The trial court had several discussions with counsel and the jury in open court, in which the trial court clearly referenced the extension of the session. The transcript from Friday, 9 July 2004, reads in pertinent part:

THE COURT: . . . It is Friday afternoon, after three o’clock[.] . . . So, in my discretion, and I do apologize that you will need to come back on Monday, but, in my discretion, I’m going to let you go for the day but you will need to be back here on Monday. Now, on Mondays, we don’t start at 9:30. We start at 10:00. And what will happen on Monday, that should be the last day, one way or the other in this case. But, as I told you at the outset, I can’t make any guarantees, one way or the other, but you do need to be here Monday. You do need to be here at 10:00 o’clock. . . . As I indicated, please be mindful that the starting time on Monday is 10:00 instead of 9:30. When you come back on Monday, I ask that you come back to the same room that you’ve been coming back to.

. . . .

THE COURT: It will give you an opportunity over the weekend to look at it to just make sure there’s no error, omission or anything else that we need to clarify Monday morning. . . . Anything else we need to take up today? State or Defendant?

[THE STATE]: No, Your Honor.

[DEFENSE]: No, Your Honor.

THE COURT: All right then, as I understand it, Monday morning we will basically conclude the charge conference and at that time move forward.

. . . .

THE COURT: . . . Anything else we need to take up at this time?

[THE STATE]: No, Your Honor.

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[DEFENSE]: No, sir.

THE COURT: All right, have a good weekend and I'll see you Monday.

(Court is recessed for the day at 4:00 p.m.)

The trial court reconvened the following Monday at 10:00 a.m. The transcript from Monday, 12 July 2004, reads in part:

(July 12, 2004—10:00 a.m.)

THE COURT: Good morning. Let the record reflect we are back in court. Twelve members of the jury are here but they are not in the courtroom.

. . . .

THE COURT: All right. The charge conference is closed. Are there any other issues to take up on the record at this time before we proceed with closing arguments? Anything from the State?

[THE STATE]: No, sir.

THE COURT: Anything from the Defendant?

[DEFENSE]: No, Your Honor.

While it would have been the better practice for the trial court to expressly set forth in the minutes a formal order extending the court session, we hold that the trial court, in making repeated announcements in open court without objection from defendant, satisfied N.C. Gen. Stat. § 15-167. This assignment of error is overruled.

II.

[2] In his next assignment of error, defendant argues that the trial court erred in admitting testimony that defendant had sexually harassed other inmates in the Brunswick County jail. Defendant argues that the testimony was improperly admitted as evidence of defendant's character, in violation of N.C. Gen. Stat. § 8C-1, Rule 404(a), and that the State never recited the purpose for which it was seeking to have the evidence admitted, in violation of N.C. Gen. Stat. § 8C-1, Rule 404(b). North Carolina Rule of Evidence 402 provides, in pertinent part, that "[a]ll relevant evidence is admissible" and that "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2003). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is

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of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2003). Rule 403 limits the admission of relevant evidence where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2003).

Rule 404(a) provides that “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]” N.C. Gen. Stat. § 8C-1, Rule 404(a) (2003). Rule 404(b) continues:

(b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003).

“We have held that Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that [the] defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002). The list of purposes in the second sentence of subsection (b) of Rule 404 is neither exclusive nor exhaustive. *State v. Morgan*, 315 N.C. 626, 637 n. 2, 340 S.E.2d 84, 91 n. 2 (1986).

At trial, defendant did not object to the evidence of prior acts. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states, in part, that “[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]” N.C.R. App. P. 10(b)(1). Where a defendant does not object at trial, our review of this issue is limited to plain error. *See* N.C.R. App. P. 10(c)(4). Our Supreme Court has stated that

[p]lain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

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State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Under this standard, a “defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.” *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

In this case, defendant fails to show that the jury probably would have reached a different result had the evidence of prior bad acts not been admitted. Defendant argues that the jury’s acquittal of defendant on the original charge of first degree sexual offense shows that the jury had some reservations about defendant’s guilt, and that the evidence of prior acts unfairly influenced the jury’s result. We are not persuaded. Defendant was convicted of second-degree sexual offense under N.C. Gen. Stat. § 14-27.5. To find defendant guilty of this offense, the jury found beyond a reasonable doubt that defendant “engage[d] in a sexual act with another person . . . [b]y force and against the will of the other person[.]” N.C. Gen. Stat. § 14-27.5 (2003). To find defendant guilty of the original charge of first degree sexual offense, the jury must have found the additional element that defendant

- a. Employ[ed] or display[ed] a dangerous or deadly weapon or an article which the other person reasonably believe[d] to be a dangerous or deadly weapon; or
- b. Inflict[ed] serious personal injury upon the victim or another person; or
- c. . . . commit[ted] the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.4 (2003).

The jury’s failure to find an additional element of first degree sexual offense does not in itself show that the jury doubted that defendant engaged in a sexual act with Zack by force and against Zack’s will. The State presented substantial evidence of defendant’s guilt through the testimony of Rash, who was present in the cell at the time of the assault. Rash testified that he heard Zack say “[n]o” and saw the fight between defendant and Zack, whose pants were down. Rash heard defendant threaten to kill Zack if Zack said anything, and later heard defendant brag about raping Zack. This testimony was corroborated by Burriss and Narem, who also heard defendant bragging about the sexual assault. In light of the evidence of defendant’s guilt presented

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at trial, we hold the trial court did not commit plain error in admitting evidence of defendant's prior acts. *See State v. Perkins*, 154 N.C. App. 148, 571 S.E.2d 645 (2002).

Defendant argues in the alternative that the testimony should have been excluded because the trial court never performed the requisite balancing test under N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 permits a trial court to exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.G.S. § 8C-1, Rule 403. Since all evidence against a defendant is necessarily prejudicial, evidence may only be excluded when it is *unfairly* prejudicial. *See State v. Mercer*, 317 N.C. 87, 94-95, 343 S.E.2d 885, 889-90 (1986). Again, defendant fails to show that the jury probably would have reached a different result had the evidence of prior bad acts not been admitted. Accordingly, we find no plain error.

Defendant presented no argument on his remaining assignments of error and they are therefore abandoned. N.C.R. App. P. 28(b)(6).

No prejudicial error.

Judges McCULLOUGH and JACKSON concur.

CENTRAL TELEPHONE COMPANY, PETITIONER v. E. NORRIS TOLSON, SECRETARY
OF REVENUE, STATE OF NORTH CAROLINA AND HIS SUCCESSORS,
RESPONDENT

No. COA04-1224

(Filed 15 November 2005)

1. Taxation— Tax Review Board—jurisdiction

The Tax Review Board lacked subject matter jurisdiction over petitioner's refund claim because the claim rested on the use of an alternate formula, which the Augmented Tax Review Board had not authorized. The Augmented Tax Review Board is vested with exclusive power to allow use of any method not provided by statute, and the Tax Review Board properly dismissed the claim.

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2. Taxation— refund—use of alternate apportionment formula—Augmented Board decision—controlling

The Augmented Tax Review Board's denial of petitioner's request to use an alternate apportionment formula controlled the Tax Review Board's decision on petitioner's refund claim because the ultimate issue was the same, although different remedies were sought.

3. Taxation— Tax Review Board—jurisdiction—constitutional issues

As an administrative tribunal, the Tax Review Board lacked the authority or jurisdiction to make a determination regarding the constitutionality of the tax resulting from application of N.C.G.S. § 105-130.4.

4. Taxation— denial of alternate formula—redress

Petitioner was not without redress for the denial of the use of an alternate apportionment formula because N.C.G.S. § 105-267 provides an avenue for filing a civil action under the superior court's original jurisdiction.

5. Taxation— Tax Review Board—jurisdiction

The trial court properly did not reach the merits of petitioner's tax refund claim where it correctly determined that the Tax Review Board lacked jurisdiction.

Appeal by petitioner from an order entered 3 June 2004 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 10 May 2005.

Morrison & Foerster LLP, by Paul H. Frankel (pro hac vice) and Alston & Bird LLP, by Jasper L. Cummings, Jr., for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kay Linn Miller Hobart, for respondents-appellees.

JACKSON, Judge.

Central Telephone Company ("petitioner") appeals from an order of the Wake County Superior Court entered 3 June 2004 affirming the Tax Review Board's ("the Tax Board") dismissal of petitioner's petition for administrative review of the Secretary of Revenue's ("the

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Secretary”) denial of petitioner’s refund claim. The facts giving rise to this appeal are undisputed. Petitioner, during the relevant period, was a Delaware Corporation with its principal place of business in Chicago, Illinois and was authorized to do business in North Carolina. Petitioner’s business included providing telecommunication services in North Carolina, Iowa, Minnesota and Nevada. In 1991 petitioner sold its operating divisions in Iowa and Minnesota resulting in a realized gain to petitioner of \$170,331,652.00.

Because petitioner believed that the gain from this sale of its operating divisions in Iowa and Minnesota would result in disproportionate and improper North Carolina state income tax under North Carolina’s standard apportionment formula, petitioner filed a petition with the Augmented Tax Review Board (“Augmented Board”) pursuant to North Carolina General Statutes, section 105-130.4(t). In this petition, petitioner requested permission to file its North Carolina return using the separate accounting method rather than the statutory apportionment formula to reflect more accurately its North Carolina taxable income. No decision on the claim had been made by 19 September 1992, the date petitioner’s return was due after being granted an extension of time to file, and petitioner filed its claim using the statutory apportionment formula and paid the resulting tax liability.

The Augmented Board subsequently denied petitioner’s request on 16 June 1995, thus requiring the use of the statutory apportionment formula to calculate petitioner’s 1991 North Carolina taxes. Petitioner filed an amended 1991 North Carolina corporate income tax return on 17 July 1995 using a bifurcated apportionment method to calculate its tax liability. Contemporaneously with its amended return, petitioner filed a claim for a refund with the Secretary, pursuant to North Carolina General Statutes, section 105-266.1, in excess of four million dollars. An administrative hearing was held regarding the refund claim. Petitioner raised three issues at the hearing: (1) whether petitioner was authorized to use an alternate formula or apportionment method in making its 1991 North Carolina income tax return; (2) whether the income from the sale of petitioner’s Iowa and Minnesota operating divisions was business or non-business income; and (3) whether North Carolina constitutionally was precluded from taxing the gains from the sale of the Iowa and Minnesota operating divisions as they were not part of petitioner’s unitary business.

On 29 December 2000, the Secretary denied petitioner’s first issue on the basis that authority to grant the requested relief was not

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vested in the office of the Secretary. The second issue raised by petitioner also was denied on 29 December 2000 on the basis that petitioner, and not petitioner's North Carolina subsidiary, was the taxpayer and the gain from the sale of the Iowa and Minnesota operating divisions was the business income of petitioner. The Secretary took the third issue under advisement, ordering petitioner to produce certain documents relevant to the determination of that issue by 30 June 2001. On 19 November 2001, after petitioner failed to produce the documents as ordered by the Secretary, the third issue was decided against petitioner on the separate and independent bases that: (1) in the absence of evidence that the income should be excluded from petitioner's unitary business income, a constitutional issue had been raised and that the Secretary had no authority to rule on constitutional issues; (2) petitioner had failed to carry its burden of showing by clear and cogent evidence that the Iowa and Minnesota divisions were unrelated to petitioner's business activity and constituted discrete business enterprises from petitioner as a whole; and (3) petitioner's amended return, as filed, was not a lawful return and therefore the Secretary had no authority to issue a refund based upon the amended return. Additionally, the Secretary dismissed petitioner's refund claim as a sanction for its refusal to comply with the order to produce additional documents which were deemed necessary to the determination of the final issue presented by petitioner.

Petitioner timely petitioned the Tax Board for review of the Secretary's denial of its refund claim. The Tax Board dismissed petitioner's refund claim on 4 June 2002 for lack of jurisdiction and petitioner filed a petition for judicial review in Wake County Superior Court on 3 July 2002. The court affirmed the Tax Board's dismissal of the refund claim on 3 June 2004. Petitioner timely appealed to this Court.

In addition to the instant appeal, petitioner also had pursued review of the Augmented Board's denial of its petition to use a method other than the statutory apportionment formula for the calculation of its North Carolina Corporate income tax. That review ultimately resulted in an appeal before this Court: *In re the Petition of Cent. Tel. Co.*, 167 N.C. App. 14, 604 S.E.2d 680 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 281, 610 S.E.2d 203 (2005) ("*Central Telephone I*"). Our opinion in *Central Telephone I*, affirming the denial of the petition to utilize an alternate apportionment formula, is instructive in the instant case, as many of the issues are similar.

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Petitioner argues that the superior court committed reversible error in affirming the Tax Board's dismissal of its petition for review because: (1) the Tax Board failed to consider the merits of petitioner's argument that the 1991 gain was not apportionable; (2) the decision of the Augmented Board was not an adequate basis for dismissal of the petition as different remedies were sought in the two proceedings; (3) the effect of the dismissal was to leave petitioner without any avenue of appeal on the merits of the issue; (4) the court considered matters on review not considered by the Tax Board; and alternatively; (5) if the petition was denied on the merits, the 1991 gain was not apportionable under the Due Process and Commerce Clauses of the United States Constitution.

[1] Petitioner first argues that the superior court committed reversible error in affirming the Tax Board's dismissal of its petition for review of the Secretary's denial of its refund claim because the Tax Board failed to consider the merits of petitioner's argument that the 1991 gain was not apportionable. The Tax Board dismissed the petition for lack of subject matter jurisdiction over the basis for the claim. Subject matter jurisdiction refers to the authority, conferred by statute or the state constitution, of a tribunal to resolve a particular type of controversy. *See Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987).

The basis for petitioner's refund claim is its amended 1991 income tax return that utilized a bifurcated formula for apportioning its income to North Carolina. This formula differs from the statutorily prescribed method, and the Augmented Board is vested with the exclusive power to allow the use of any method other than that statutorily provided. N.C. Gen. Stat. § 105-130.4(t)(4) (2000). As the Augmented Board had not authorized petitioner to utilize an alternate formula, the use of the bifurcated formula rendered petitioner's return unlawful. *Id.* The Tax Board did not have the authority to allow petitioner to use an alternate formula in this instance and the Tax Board was not authorized to take any action which would have made the return lawful. To grant petitioner's refund claim based on the amended return utilizing an unauthorized alternate apportionment formula would have been tantamount to authorizing the use of that formula. The Tax Board lacked subject matter jurisdiction over the matter as it had no power to do so.

When subject matter jurisdiction over a matter is lacking, it is unnecessary to reach the merits of the controversy. *See In re N.R.M.*, 165 N.C. App. 294, 301, 598 S.E.2d 147, 151 (2004). Nor would it be

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proper for us to reach the merits, as the lack of subject matter jurisdiction deprives a tribunal of any authority to reach a resolution of the matter in any case. *See Harris*, 84 N.C. App. at 667, 353 S.E.2d at 675. As discussed *supra*, the Tax Board lacked subject matter jurisdiction over the basis for the petition and therefore it properly was dismissed without reaching the merits of petitioner's argument. This assignment of error is overruled.

[2] Petitioner next argues that the Augmented Board's ruling denying petitioner's request to use an alternate apportionment formula was not an adequate basis for the Tax Board's dismissal of the petition as different remedies were sought in the two proceedings. As previously discussed, the basis for petitioner's refund claim in the instant action is its amended income tax return which was completed using an alternate apportionment formula. Accordingly, although the remedies sought were different, the ultimate issue to be decided was the same—whether petitioner was authorized to use a method of apportionment other than that statutorily prescribed. The Augmented Board previously had denied petitioner's request to utilize an alternate apportionment formula to calculate its North Carolina taxable income. Because of the Augmented Board's previous denial of the use of an alternate formula, petitioner's amended return utilizing that formula was unlawful. Consequently, the ruling of the Augmented Board was controlling on the Tax Board's decision in this matter.

[3] Further, as an administrative tribunal, the Tax Board lacked the authority or jurisdiction to make a determination regarding the constitutionality of the tax resulting from the application of North Carolina General Statutes, section 105-130.4. It is a "well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board." *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *see also Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977) (N.C. Gen. Stat. § 105-266.1 confers no authority upon the Secretary to refund an illegal or invalid tax because questions of constitutionality must be decided by the courts).

Clearly, the Tax Board had no subject matter jurisdiction over any of the issues brought before it by petitioner and the petition was properly dismissed. Accordingly, this assignment of error is overruled.

[4] Petitioner's third argument that the dismissal of its petition for review effectively left petitioner without an opportunity to appeal the

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Commissioner's ruling on its refund claim on its merits is unpersuasive. In *Central Telephone I*, this Court addressed petitioner's similar due process claim and held that such a claim would have merit only if petitioner was completely without redress after a decision was made by the Augmented Board. 167 N.C. App. at 26-7, 604 S.E.2d at 688.

North Carolina General Statutes, section 105-267 provides an avenue for an aggrieved taxpayer to file a civil action under the superior court's original jurisdiction against the Secretary for the refund of overpaid taxes. Further, section 105-267 affords the exclusive means for challenging the levy of an unlawful tax, even on constitutional grounds. *Bailey v. State*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992), *overruled in part on other grounds by Bailey v. State*, 348 N.C. 130, 167, 500 S.E.2d 54, 76 (1998). Here, petitioner had an adequate means of redress and accordingly its due process argument is without merit. Petitioner filed an action pursuant to section 105-267 which was dismissed as untimely. The issue of whether the dismissal of that action was proper is not before us. Therefore, this assignment of error is overruled.

[5] Petitioner's next argument is that the trial court exceeded its jurisdictional limits in reviewing the Tax Board's decision on the refund claim by considering matters that the Tax Board did not. A superior court, sitting as an appellate court over an administrative body's decision, has jurisdiction to review only those issues decided by the administrative body as its jurisdiction is derivative from the original jurisdiction of the body being reviewed. *Central Telephone I*, 167 N.C. at 27, 604 S.E.2d at 688.

The Tax Board's denial of petitioner's refund claim was based on the fact that petitioner had utilized an alternate allocation method in calculating its tax liability and corresponding refund and that the Augmented Board had not authorized the use of such a method. Accordingly, the trial court's review was limited to whether the Augmented Board's decision supported dismissal of the petition. As we held in *Central Telephone I*, the appropriate method for obtaining review of a decision of the Augmented Board is by filing a civil action pursuant to North Carolina General Statutes, section 105-267. Absent such a review overturning the decision of the Augmented Board, the Tax Board lacked subject matter jurisdiction to order a refund based on factors contrary to that decision.

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Contrary to petitioners assertions, the trial court did not reach the merits of petitioner's refund claim. The trial court determined that the Tax Board's dismissal of petitioner's refund claim was proper as it lacked jurisdiction over the matters brought before it. This assignment of error is overruled.

Petitioner's final assignment of error was raised in the alternative in the event that this Court found that its petition had been dismissed on its merits. As we have held that the petition properly was dismissed for lack of subject matter jurisdiction and not on its merits, it is unnecessary to reach petitioner's additional assignments of error.

Affirmed.

Judges WYNN and BRYANT concur.

LIONEL LEWIS, EMPLOYEE, PLAINTIFF V. CRAVEN REGIONAL MEDICAL CENTER,
EMPLOYER AND VIRGINIA INSURANCE RECIPROCAL, CARRIER, DEFENDANTS

No. COA04-1656

(Filed 15 November 2005)

1. Workers' Compensation— partial incapacity—post-injury capacity to earn wages

The Industrial Commission did not err in a workers' compensation case by considering plaintiff employee's post-injury capacity to earn wages in calculating benefits for partial incapacity under N.C.G.S. § 97-30 where the employee has not actually returned to work.

2. Workers' Compensation— Form 26 agreement—alternative favorable remedies

The Industrial Commission did not err in a workers' compensation case by concluding on the date the Form 26 was approved that N.C.G.S. § 97-30 provided a more favorable remedy than plaintiff received pursuant to N.C.G.S. § 97-31 under the Form 26 agreement based on the Commission's use of the federal minimum wage as plaintiff's earning capacity, because the determination was supported by relevant medical and record evidence.

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3. Appeal and Error— preservation of issues—failure to assign error

Although defendants contend the Industrial Commission erred in a workers' compensation case by failing to give defendants a credit for temporary total disability benefits paid past the date defendant reached maximum medical improvement, this argument is dismissed because: (1) defendants failed to assign error to the Commission's opinion and award on the basis that a credit was erroneously overlooked by the Commission as required by N.C. R. App. P. 10(a); and (2) none of the assignments of error direct the attention of the Court of Appeals to an alleged error regarding the credit, nor are there clear or specific record or transcript references included in the brief as required by N.C. R. App. P. 10(c)(1).

Appeal by defendants from opinion and award entered 30 July 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 October 2005.

The Law Offices of George W. Lennon, by George W. Lennon and S. Neal Camak, and Hugh D. Cox, for plaintiff-appellee.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by Jill Quattlebaum Byrum and B. Kyle Dickerson, for defendant-appellants.

MARTIN, Chief Judge.

Craven Regional Medical Center and Virginia Insurance Reciprocal (collectively "defendants") appeal from an opinion and award of the North Carolina Industrial Commission (the "Commission") setting aside the Commission's previous approval of a Form 26 agreement on the grounds that the benefits awarded thereunder were less favorable than those available under N.C. Gen. Stat. § 97-30 (2003). We affirm.

Lionel Lewis ("plaintiff") suffered a herniated disc in his back on 23 February 1990 during the course and scope of his employment. Defendants admitted liability and paid plaintiff temporary total disability from 30 March 1990 through 28 January 1991 as provided by a Form 21 agreement approved by the Commission on 31 October 1991. Beginning on 28 January 1991 and continuing for a period of forty-five weeks, plaintiff received worker's compensation for a fifteen percent permanent partial disability to his back as provided for by N.C. Gen.

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Stat. § 97-31 pursuant to a Form 26 agreement approved by the Commission on 10 October 1991.

On 14 May 1992, plaintiff sought additional compensation on the grounds that he suffered a substantial change of condition. Both the deputy commissioner and the Commission rejected plaintiff's claim of a change in condition. In so doing, the Commission found as fact that, "[d]espite his very limited education and his work history of manual labor, [plaintiff] has had wage earning capacity. . . . His allegation that he has been totally disabled is not accepted as credible." Plaintiff appealed, and this Court affirmed, holding the Commission's findings of fact supported its conclusion that there had been no change in plaintiff's condition. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) ("*Lewis I*"). Although plaintiff argued to this Court that the Form 26 agreement was not fair and just, the Court declined to address the issue in the absence of a motion by plaintiff to the Commission to have the agreement set aside. *Lewis I*, 122 N.C. App. at 148, 468 S.E.2d at 274.

On 6 June 1996, plaintiff requested a hearing before the Commission to challenge the Form 26 agreement on the grounds that it was not fair to plaintiff at the time it was entered and was, therefore, improvidently approved by the Commission. The deputy commissioner rejected plaintiff's challenge to the Form 26 agreement, but the Full Commission reversed. Contrary to its earlier determination that plaintiff retained wage earning capacity, the Commission found plaintiff had been incapable of earning wages since 23 February 1990 and determined that plaintiff was qualified to receive benefits under N.C. Gen. Stat. § 97-29. Upon comparing the disability compensation provided under the Form 26 agreement with those calculated pursuant to N.C. Gen. Stat. § 97-29, the Commission concluded the Form 26 agreement did not provide plaintiff with the most favorable disability benefits to which he was entitled and, therefore, must be set aside. *Accord Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 432-33, 444 S.E.2d 191, 195 (1994).

Defendant appealed and this Court reversed, holding (1) there was no competent evidence in the record to support the finding that plaintiff was incapable of earning wages with defendant-employer or in any other employment so as to be entitled to benefits under N.C. Gen. Stat. § 97-29 and (2) the Commission was collaterally estopped from finding plaintiff to be incapable of work on 10 October 1991 by virtue of its previous finding that plaintiff retained wage earning capacity at the time the Form 26 agreement was approved. *Lewis v.*

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Craven Reg'l Med. Ctr., 134 N.C. App. 438, 442, 518 S.E.2d 1, 4 (1999), *aff'd per curiam*, 352 N.C. 668, 535 S.E.2d 33 (2000) ("*Lewis II*"). The matter was remanded to the Commission for a determination of whether plaintiff would receive a greater benefit under N.C. Gen. Stat. § 97-30 than he received under the Form 26 agreement. *Id.* at 443, 518 S.E.2d at 4.

On remand, the Commission concluded that the compensation provided in the agreement was less favorable to plaintiff than that available under N.C. Gen. Stat. § 97-30 and again set aside the Form 26 agreement. Building on its initial opinion and award, which determined that plaintiff had retained wage-earning capacity since his injury, the Commission took judicial notice of the federal minimum wage in 1991 and inferred plaintiff's wage-earning capacity to be equal to the minimum wage. The Commission rejected the possibility that plaintiff could earn more than the minimum wage because "there [was] no indication in the record" justifying the elevation of his wage-earning capacity above minimum wage. Based on the federal minimum wage in 1991, the Commission calculated plaintiff was entitled to the amount of \$24,298.28 under N.C. Gen. Stat. § 97-30, which was greater than the \$10,116.45 plaintiff received pursuant to the Form 26 agreement. The Commission made findings of fact and conclusions of law that plaintiff was not provided the most favorable remedy, set aside the Form 26 agreement, and awarded plaintiff \$14,181.83, the difference between the benefits he had already received under the Form 26 agreement and the benefits as calculated under N.C. Gen. Stat. § 97-30. Defendants appeal.

Our standard of review in reviewing an appeal from the Commission is well-established. We are to determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact "are conclusive on appeal when supported by competent evidence," irrespective of evidence supporting a contrary finding, *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). The evidence is to be taken in the light most favorable to the plaintiff, who "is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese*,

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352 N.C. at 115, 530 S.E.2d at 553. The Commission's conclusions of law, however, are reviewable *de novo*. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003).

[1] In their first appellate contention, defendants assert the "provisions of N.C. Gen. Stat. § 97-30 do not account for the calculation of a wage differential when an employee is not earning a post-injury wage." Defendants argue the statutory provision "contemplates that benefits under this section may be awarded only when the employee has returned to some type of employment at which he or she earns wages after the injury." We reject defendants' interpretation of N.C. Gen. Stat. § 97-30 for three reasons.

First, a calculation of compensation for partial incapacity is based on the difference in a claimant's "average weekly wages before the injury and the average weekly wages which he *is able to earn* thereafter" N.C. Gen. Stat. § 97-30 (emphasis added). By focusing the calculation on post-injury wage-earning capacity and not actual post-injury wages, the statutory provision accords with the overall structure of the Workers' Compensation Act. *See Hill v. DuBose*, 234 N.C. 446, 447-48, 67 S.E.2d 371, 372 (1951) ("Compensation must be based upon loss of wage-earning power rather than the amount actually received"); *see also Evans v. Asheville Citizens Times Co.*, 246 N.C. 669, 100 S.E.2d 75 (1957). Second, it was well established in the previous two appeals that plaintiff had not returned to work. If defendants' theory was adopted and plaintiff could not qualify for benefits under N.C. Gen. Stat. § 97-30 due to his failure to return to work, our remand in *Lewis II* for determination of whether "[p]laintiff would have been entitled to receive a greater benefit under section 97-30 than he received under the Form 26" would have been meaningless. *Lewis II*, 134 N.C. App. at 443, 518 S.E.2d at 4. Third, we have previously held that an employee is not entitled to benefits under N.C. Gen. Stat. § 97-30 where an employer shows the employee unjustifiably refused employment suitable to his capacity. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996). It stands to reason that an employee who does not return to work due to the lack of employment suitable to his capacity procured by his employer would not be barred from entitlement to benefits. Accordingly, we reject defendants' contention that the Commission cannot consider an employee's post-injury capacity to earn wages in calculating benefits for partial incapacity under N.C. Gen. Stat. § 97-30 where the employee does not actually return to work.

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[2] By their second argument, defendants contend there was no competent evidence before the Commission on the date the Form 26 was approved from which the Commission could have determined that N.C. Gen. Stat. § 97-30 provided a more favorable remedy than plaintiff received pursuant to N.C. Gen. Stat. § 97-31 under the Form 26 agreement. The Commission took judicial notice of the federal minimum wage in 1991, as it was entitled to do, in order to calculate plaintiff's compensation under N.C. Gen. Stat. § 97-30. Defendants contend the Commission's use of the federal minimum wage as plaintiff's earning capacity (had he been working at the time the Form 26 was entered into) was speculative and unsupported by competent evidence. We disagree.

Following our remand in *Lewis II* for further consideration of plaintiff's entitlement to benefits under N.C. Gen. Stat. § 97-30 for partial incapacity, the Commission allowed the parties to submit new briefs. The Commission found as fact that defendants presented "[n]o evidence of a single job plaintiff could obtain and keep within his restrictions" at the various hearings in this case. Indeed, a medical record notation dated 28 November 1990 indicates that defendants would not let plaintiff return to limited duty work and that defendants subsequently discharged him by the time he was seen by his treating physician on 21 March 1991. The Commission went further and noted that there was "no indication in the record that plaintiff could earn more than the federal minimum [wage]." In addition, the Commission noted plaintiff had been rated as having a 15% permanent partial disability to his back. This permanent disability was considered by the Commission in conjunction with plaintiff's educational limitation of being functionally illiterate, plaintiff's work history and work restrictions, and his on-going pain. In light of these factors, all of which were proper for consideration by the Commission in determining plaintiff's wage-earning capacity, and the Commission's previous finding that plaintiff was not totally disabled, the Commission determined plaintiff's wage-earning capacity diminished to the fullest extent allowed by federal law. In so doing, the Commission performed its duty to review the record evidence and make a determination as to plaintiff's residual wage-earning capacity.

Defendants argue that, viewing plaintiff's restrictions, plaintiff might have been capable of earning more than the minimum wage. Such an argument is little more than an invitation to this Court to review the record evidence of plaintiff's restrictions and limitations and make a determination different than that which was reached by

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the Commission, a task which is beyond our scope of review. We hold the Commission's determination, that plaintiff retained only minimal earning capacity, was supported by the relevant medical and record evidence and accords with this Court's mandate in *Lewis II*. This argument is overruled.

[3] Defendants additionally argue the Commission erroneously failed to give them a credit for temporary total disability benefits paid past the date plaintiff reached maximum medical improvement. However, defendants failed to assign error to the Commission's opinion and award on the basis that a credit was erroneously overlooked by the Commission; accordingly, this argument has not been properly preserved for appellate review and is overruled. N.C. R. App. P. 10(a) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10"). None of the assignments of error direct the attention of this Court to an alleged error regarding the credit, nor are there clear or specific record or transcript references included in the brief as required by N.C. R. App. P. 10(c)(1).

We have carefully considered defendants' remaining arguments and find them to be without merit. The opinion and award of the Commission is affirmed.

Affirmed.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. ERNEST LAMONT INMAN

No. COA05-150

(Filed 15 November 2005)

1. Firearms and Other Weapons— possession of firearm by convicted felon—failure of indictment to allege date of prior felony conviction

The trial court did not lack jurisdiction to try defendant for the charge of possession of a firearm by a convicted felon even though the indictment charging defendant with this offense failed to allege the date of the prior felony conviction, because: (1) the

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provision of N.C.G.S. § 14-415.1(c) that requires the indictment to state the conviction date for the prior offense is merely directory; and (2) the omission was not material and does not affect a substantial right, and this conclusion is especially appropriate in this case when defendant stipulated to the prior conviction at trial and challenged only whether he was in possession of a firearm.

2. Criminal Law— instruction—constructive possession

The trial court did not commit plain error in a possession of a firearm by a convicted felon case by its instruction concerning constructive possession, because: (1) a defendant's control over an area may be such that the jury may infer a defendant's constructive possession of contraband from his control of the premises; and (2) the trial court properly instructed the jury that it could infer defendant's constructive possession of the handgun based on his control over the area in which it was found which was between his leg and the inner console of the vehicle he was driving.

Appeal by defendant from judgment entered 27 May 2004 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 13 October 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Kevin P. Bradley for defendant appellant.

McCULLOUGH, Judge.

Defendant (Ernest Lamont Inman) appeals from conviction and judgment for possession of a firearm by a convicted felon. We hold that he received a fair trial, free from prejudicial error.

Facts

On 9 July 2003, two Greensboro police officers initiated pursuit of a silver Honda Civic upon observing it traveling in the wrong lane and ignoring a stop sign. The Civic turned into a private driveway, accelerated, and made a left turn behind a house. Once the vehicle stopped, the passenger immediately exited and absconded. Defendant, who was the driver of the Civic, remained.

Upon approaching the vehicle and peering through the driver's side window, one of the officers noticed a large black handgun tucked

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between defendant's right leg and the center console. According to the officer, the gun was "right up against [defendant's] right leg." Defendant later told the police, "my fingerprints are probably on the gun, but it's not mine." No fingerprints were found on the gun.

The officer also found a green substance in the driver's side door, which defendant identified as "hash" belonging to him; however, testing revealed that this substance did not contain a controlled substance. Five bags containing a total of 13.8 grams of marijuana were seized from the passenger's side door of the vehicle.

Defendant was indicted for possession with intent to sell and deliver marijuana and possession of a firearm by a felon. A Guilford County jury acquitted defendant of the drug charge and convicted him of the firearms charge. For this conviction, the trial court imposed a sentence of 96 to 125 months' imprisonment. Defendant now appeals.

I.

[1] In his first argument on appeal, defendant contends that the trial court lacked jurisdiction to try him for possession of a firearm by a convicted felon because the instrument charging him with this offense failed to allege the date of the prior felony conviction. We disagree.

Section 14-415.1(a) of the North Carolina General Statutes makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." N.C. Gen. Stat. § 14-415.1(a) (2003). Subsection (c) of the same statute provides that

[a]n indictment which charges [this offense] must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

N.C. Gen. Stat. § 14-415.1(c) (2003).

Even where a statute requires a particular allegation, the omission of such an allegation from an indictment is not necessarily fatal to jurisdiction:

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“In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.” . . . While, ordinarily, the word “must” and the word “shall,” in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

State v. House, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978) (citations omitted). For example, this Court has held that “the provision of [section] 14-415.1(c) that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right” because a defendant “is no less apprised of the conduct which is the subject of the accusation than he would have been if the penalty for the prior conviction had been included in the indictment.” *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004).

The issue in the instant case is whether the provision of section 14-415.1(c) that requires the indictment to state the conviction date for the prior offense is mandatory or directory. Changes to the legislation proscribing firearm possession by convicted felons reveals that, as the statute is now written, the provision is merely directory.

When the legislature first outlawed possession of a firearm by a convicted felon, the prohibition applied only to persons who had been convicted of a crime punishable by more than two years’ imprisonment and had not had their civil rights restored. 1971 N.C. Sess. Laws ch. 954, §§ 1, 2. Four years later, the General Assembly changed the law to preclude possession of firearms by persons convicted of certain enumerated crimes for either five years after the date of their conviction or the completion of their sentence, whichever was later. 1975 N.C. Sess. Laws ch. 870, § 1. Finally, in 1995, the legislature changed the law to prohibit possession of a firearm by any person having been convicted of any felony without regard to the date of the prior conviction or the time of completion of the sentence imposed therefor. 1995 N.C. Sess. Laws ch. 487, § 3. Under this version of the statute, the date of a defendant’s prior conviction is immaterial so

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long as defendant is sufficiently apprised of the conduct for which he is being indicted. See *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (“[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.”).

In the instant case, the challenged indictment alleged that

on or about [9 July 2003] and in the county [of Guilford] the defendant . . . unlawfully, willfully and feloniously did have in his custody, care and control a Stallard Arms, 9 mm pistol, a handgun, after being previously . . . convicted of the felony of Breaking and Entering a Motor Vehicle, in Guilford County Superior Court. This offense occurred on December 15, 2001 and the defendant was sentenced to 6-8 months['] imprisonment, which was suspended for 36 months. This prior offense was a Class I felony, punishable by a maximum of 15 months in the Department of Corrections.

The only item excluded from the indictment is the date of defendant's previous conviction for breaking and entering a motor vehicle. We hold that this omission is not material and does not affect a substantial right. This conclusion is especially appropriate where, as here, defendant stipulated to the prior conviction at trial and challenged only whether he was in possession of a firearm. See *State v. English*, 171 N.C. 277, 285, 614 S.E.2d 405, 411 (2005) (Steelman, J., concurring) (admonishing appellate counsel for attempting to circumvent a stipulation entered into at trial without arguing that the stipulation was invalid or was the product of ineffective assistance of counsel).

This assignment of error is overruled.

II.

[2] In his second argument on appeal, defendant contends that the trial court's instruction concerning constructive possession amounted to plain error. This contention lacks merit.

In the instant case, the trial court initially instructed the jury as follows:

Now possession of an article may be either actual or constructive. A person has actual possession of an article if he has it

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on his person, is aware of its presence and either by himself or together with others has both the power and intent to control its disposition and use.

A person has constructive possession of an article if he does not have it on his person but is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition and use.

A person's awareness of the presence of the article and his power and intent to control its disposition and use may be shown by direct evidence, or may be inferred from the circumstances.

If you find beyond a reasonable doubt that the article—in this particular case I'm referring to the handgun which was shown to you. If it was found in close proximity to the defendant, that would be a circumstance from which together with other circumstances you may infer that the defendant was aware of the presence of the article, that being the handgun, and had the power and intent to control its disposition and use.

However, the defendant's physical proximity, if any, to the handgun does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition and use. Such an inference may be drawn only from this and other circumstances from which you find from the evidence beyond a reasonable doubt.

If you find beyond a reasonable doubt that the article was found in a certain place and that the defendant exercised control over that place, such as a house, a car. In this particular situation the evidence shows the handgun was found in a car and the defendant was driving that particular car. Whether or not the defendant owned the vehicle or the car, this would be a circumstance from which you may infer that the defendant was aware of the presence of the handgun and had the power and intent to control its disposition and use.

During its deliberations, the jury sent a letter to the judge which stated, "We need definition of the law 'constructive possession.' Clarification on what that means." Thereafter, the judge re-instructed the jury as follows:

If you find beyond a reasonable doubt that the handgun was found in close proximity to the defendant, that would be a cir-

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cumstance from which together with other circumstances you may infer that the defendant was aware of the presence of the handgun, and had the power and intent to control its disposition or use. However, the defendant's proximity, if any, to the handgun does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use. Such an inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.

If you find beyond a reasonable doubt that the handgun was found on or in a place—in this particular incident it's alleged the handgun was found in the car that the defendant was operating and the handgun was in between his leg and the inner console. Correct me if I'm wrong as to where the gun was located. That's what's been alleged in this case. So, if you find beyond a reasonable doubt that the handgun was found on a place or in a place that the defendant exercised control over, that place whether or not he owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the handgun and had the power and intent to control its disposition or use.

The record is bereft of any defense objection to the trial court's jury instructions.

As defendant failed to object to the alleged instructional error at trial, this Court's review is limited to whether the trial court's instructions amounted to plain error. *See* N.C. R. App. P. 10. "In deciding whether a defect in the jury instruction constitutes 'plain error,' [an] appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). In the absence of such impact, relief is unavailable to a defendant who has not objected. *Id.*

In cases involving non-exclusive possession of an area from which contraband is seized, the trial court's instructions should reflect that "constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984). However, a defendant's control over an area may be such that "the jury . . . may infer a defendant's constructive possession of contraband from his control of the premises." *State v. Peek*, 89 N.C. App.

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123, 126-27, 365 S.E.2d 320, 323 (1988). Jury instructions concerning whether a defendant's control over an area permits a finding of constructive possession must "clearly leave[] it to the jury to decide whether to make the inference." *Id.*

In the instant case, the trial court instructed the jury that it **could** infer defendant's constructive possession of the handgun based on his control over the area in which it was found: between his leg and the inner console of the vehicle he was driving. We discern no error, and certainly no plain error, in this charge.

This assignment of error is overruled.

No error.

Judges ELMORE and LEVINSON concur.

BELLSOUTH CAROLINAS PCS, L.P., D/B/A BELLSOUTH MOBILITY DCS, PETITIONER V.
HENDERSON COUNTY ZONING BOARD OF ADJUSTMENT, RESPONDENT V.
RUSSELL PHIPPS AND SHARON PHIPPS, INTERVENORS

No. COA05-31

(Filed 15 November 2005)

Zoning— cellular telephone tower—public utility station

A cellular telephone company is a "public utility" and a cellular telephone tower is a "public utility station" under the Henderson County Zoning Ordinance. The Henderson County Zoning Board of Adjustment erred as a matter of law by holding otherwise, and the cellular telephone company was entitled to a zoning permit to build its tower in an R-20 zoning district.

Appeal by petitioner from judgment entered 5 October 2004 by Judge E. Penn Dameron, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 10 October 2005.

Van Winkle, Buck, Wall, Starnes, & Davis, P.A., by Craig D. Justus, for petitioner-appellant.

Samuel H. Fritschner for respondent-appellee.

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STEELMAN, Judge.

On 4 June 1997, the Henderson County Zoning Administrator issued a permit to petitioner, BellSouth Carolina PCS, L.P., d/b/a BellSouth Mobility DCS (Bellsouth), to build a base transceiver station (a cellular telephone tower) in an R-20 zoning district. BellSouth provides two-way telephone communication services to the public. The cellular telephone tower is necessary for BellSouth to be able to provide cellular service to that region. In reliance on the zoning permit, BellSouth erected the tower. Several county residents appealed the zoning administrator's issuance of the permit. The Henderson County Zoning Board of Adjustment (Board) heard the appeal. The Board determined that BellSouth did not qualify as a "public utility" and its cellular telephone tower was not a "public utility station." As a result, the Board vacated the zoning permit. BellSouth filed a petition for *writ of certiorari* in the Henderson County Superior Court on 26 September 1997, appealing the Board's revocation of its permit. The trial court granted Russell and Sharon Phipps' motion to intervene. On 9 July 1998, the superior court entered judgment affirming the Board's decision, but stayed the effect of its ruling pending appeal. BellSouth appealed to this Court. In an unpublished opinion filed 20 June 2000, this Court remanded the matter to the trial court for entry of further findings of fact.

The matter came before the superior court on 23 August 2004. On 5 October 2004, the trial court entered judgment affirming the Board's decision. BellSouth appeals.

Issue

The issue in this case is whether BellSouth, a wireless telecommunications provider, is a public utility entitled to a permit to construct a cellular telephone tower under the Henderson County Zoning Ordinance.

Standard of Review

The Board's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (citations omitted). Since the Board operates as the fact finder, the superior court sits as a court of appellate review. *Id.* As such, the trial court does not review the sufficiency of

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evidence presented to it, but rather reviews the evidence presented to the Board. *Id.*

The applicable standard of review when the trial court sits in the posture of an appellate court depends on the type of error assigned. *Id.* at 13, 565 S.E.2d at 17. If the petitioner asserts the board's decision is not supported by the evidence or is arbitrary and capricious, the trial court must apply the whole record test. *Id.* Under the whole record test, the trial court examines the entire record to determine whether it contains substantial evidence to support the agency's decision. *Id.* at 14, 565 S.E.2d at 17. In doing so, the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency. *Id.* at 14, 565 S.E.2d at 17-18. The trial court conducts *de novo* review when considering allegations that the board's decision was affected by error of law. *Id.* at 13, 565 S.E.2d at 17. Under *de novo* review, the reviewing court considers the matter anew, and may freely substitute its own judgment for that of the agency's. *Id.* Finally, the trial court "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Id.* at 13, 565 S.E.2d at 17.

When this Court reviews the trial court's order concerning a board's decision, we examine the order to: (1) determine whether the trial court exercised the appropriate standard of review and, if so, (2) decide whether the court did so properly. *Id.* at 14, 565 S.E.2d at 18.

In this case, the trial court carefully set forth the applicable standard of review. It applied the whole record test to the findings of fact to which plaintiff objected. It then applied *de novo* review to the Board's conclusions of law, as well as to those portions of the Board's findings of fact which were actually conclusions of law. On appeal, appellant asserts the trial court's ruling, affirming the Board's decision that it was not a public utility, was an error of law. We therefore apply *de novo* review.

Analysis

The zoning ordinance in effect at the time BellSouth applied for the zoning permit to build its cellular telephone tower in an R-20 zoning district provided in pertinent part:

SECTION 603. R-20 Low-Density Residential District

603.01. Within the R-20 Low-Density Residential District, the following uses are permitted:

. . . .

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6. Transformer and public stations, provided that:

. . . .

b. Public utility stations

1. The structures are located on sufficient land to meet all setback requirements of the ordinance.
2. The stations are completely enclosed, either by a building or a wire fence at least eight (8) feet high.
3. There is an evergreen planted buffer strip along the side and rear property lines of residential zoned property.¹

Nowhere in the zoning ordinance are the terms “public utility” or “public utility station” defined. However, the ordinance states: “Except as specifically defined herein, all words used in this ordinance have their customary dictionary definitions.” Henderson County Zoning Ordinance, Section 400.

The primary rule when interpreting a county ordinance is that the intent of the enacting body controls. *See Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187 (1993). “Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance.” *Id.* at 138, 431 S.E.2d at 188. However, since zoning ordinances restrict common-law property rights, ambiguous zoning ordinances should be interpreted to permit the free use of land. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308, 554 S.E.2d 634, 640-41 (2001).

The trial court used the definitions of public utility contained in the *American Heritage College Dictionary*, *Webster’s New World Dictionary*, and *Black’s Law Dictionary*. The *American Heritage Dictionary* defines public utility as “[a] private business organization, subject to governmental regulation, that provides an essential commodity or service to the public.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 1106 (3rd ed. 1997). *See Herring v. Liner*, 163 N.C. App. 534, 539, 594 S.E.2d 117, 120-21 (2004) (noting this Court has “routinely referred to the *American Heritage Dictionary* in determining the ordinary and usual meaning of non-technical words”). *Black’s Law Dictionary* describes a “public utility” as:

1. Subsequent to the Board’s hearing, the Henderson County Commissioners adopted the Wireless Communication Tower Ordinance. That ordinance is not at issue in this case.

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1. A company that provides necessary services to the public, such as telephone lines and service, electricity, and water. • Most utilities operate as monopolies, but are subject to governmental regulation. 2. A person, corporation, or other association that carries on an enterprise for the accommodation of the public, the members of which are entitled as a matter of right to use its facilities.

BLACK'S LAW DICTIONARY 1582 (8th ed. 2004). Although *Black's Law Dictionary* is a legal rather than standard dictionary, we find it helpful in determining the characteristics of a public utility. See *Herring*, 163 N.C. App. at 539, 594 S.E.2d at 120. These dictionary definitions are also consistent with the discussion of this issue found in the treatise *Anderson's American Law of Zoning*. Although these sources say the same thing, we believe *Anderson's* more succinctly describes the characteristics of a public utility to include: (1) the essential nature of the services offered, (2) "operat[ion] under a franchise, subject to some measure of public regulation, and (3) logistic problems, such as the fact that "[t]he product of the utility must be piped, wired, or otherwise served to each user . . . [,] the supply must be maintained at a constant level to meet minute-by-minute need[,] and [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery." 2 Kenneth H. Young, *ANDERSON'S AMERICAN LAW OF ZONING* § 12.32 (4th ed. 1996).

The determination of what constitutes a public utility requires a flexible rule. See *A & B Refuse Disposers, Inc. v. Bd. of Ravenna Township Trs.*, 596 N.E.2d 423, 426 (Ohio 1992). No single factor is controlling in determining whether an entity is a public utility, although each must be weighed, including lack of competition in the local marketplace, the good or service provided, and the existence of regulation by government authority. See *Campanelli v. AT&T Wireless Serv. Inc.*, 706 N.E.2d 1267, 1269 (Ohio 1999) (noting no one factor is determinative). It is important to note that the emphasis in such a determination should be placed on the function of the service provided rather than a literal interpretation of the definition of a public utility. *Utilities Comm. v. Southern Bell*, 326 N.C. 522, 527-28, 391 S.E.2d 487, 490 (1990) (holding the function of a public utility is controlling, not how the term is defined). Nor does the number of subscribers matter in determining whether a service is essential. See *Utilities Comm. v. Simpson*, 295 N.C. 519, 246 S.E.2d 753 (1978); *Utilities Comm. v. Telegraph Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966).

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BellSouth provides a telephone service, which has traditionally been recognized as a public utility. *See e.g. Utilities Comm. v. Southern Telegraph Co.*, 22 N.C. App. 714, 716, 207 S.E.2d 771, 773 (1974) (citing N.C. Gen. Stat. § 62-3(23)a.6). Wireless telecommunication providers are subject to governmental regulation. They must obtain a license from the Federal Communications Commission (FCC). *See* 47 U.S.C. § 301, *et al.* In addition, mobile telephone service is regulated as a “common carrier” by the FCC, and they must provide their service to the public in a reasonable and non-discriminatory manner, 47 U.S.C. § 332(c)(1)(A), just like land-line telephone companies. All common carriers are required to furnish service upon reasonable request. 47 U.S.C. § 201(a). In addition, their rates and charges must be just and reasonable, 47 U.S.C. § 201(b), and they may not make “any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services.” 47 U.S.C. § 202(a). Although BellSouth is not a monopoly, we find this factor to be of less significance in light of federal deregulation and the changing nature of technology in the telecommunications industry. *Accord Campanelli*, 706 N.E.2d at 1269-70.

Although this issue is one of first impression for this State, other states have concluded that a cellular telephone company is a public utility. *See e.g. Campanelli*, 706 N.E.2d 1267; *Nynex Mobile Communications Co. v. Hazlet Tp. Zoning Bd. of Adjustment*, 648 A.2d 724 (N.J. Super. Ct. App. Div. 1994); *Nextel Partners, Inc. v. Town of Fort Ann*, 1 A.D.3d 89 (N.Y. App. Div. 2003), *appeal denied*, 808 N.E.2d 358 (N.Y. 2004); *Cellular Tel. Co. v. Rosenberg*, 624 N.E.2d 990 (N.Y. 1993); *McCaw Communications Co. v. Marion County*, 773 P.2d 779 (Or. Ct. App. 1989). Pennsylvania has taken a contrary position. *Crown Communications v. Zoning Hearing Bd. of Borough of Glenfield*, 705 A.2d 427 (Pa. 1997). We find the reasoning of this decision to be distinguishable. Pennsylvania held the service was not a public utility because the Pennsylvania Utility Code specifically excluded “mobile domestic cellular radio telecommunications service” and the providers also were not required to render service to the general public upon reasonable demand.

Accordingly, we hold that a cellular telephone company is a “public utility.” In addition, a cellular telephone tower which provides cellular telephone service is a “public utility station” under Section 603.01 of the Henderson County Zoning Ordinance. The Board erred as a matter of law in holding BellSouth was not a public utility and by concluding that the cellular tower was not a “public utility station.”

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We reverse and remand this matter for entry of judgment consistent with this opinion.

REVERSED.

Chief Judge MARTIN and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. STEPHON LAVARRIO CAVE, DEFENDANT

No. COA05-169

(Filed 15 November 2005)

1. Larceny— indictment—corporation—entity capable of owning property

An indictment was sufficient to charge defendant with larceny and possession of stolen items even though defendant contends the named owner-entity “N.C. FYE, Inc.” does not import an entity capable of owning property, because: (1) the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment; and (2) the abbreviation “Inc.” imports the entity’s ability to own property.

2. Larceny— possession of stolen goods—motion to dismiss— sufficiency of evidence

The trial court did not err by denying defendant’s motion to dismiss the charges of larceny and possession of stolen goods, because: (1) defendant’s own testimony supports the trial court’s denial of his motion to dismiss when defendant told the officers that he was the responsible party and not the codefendants; and (2) there was sufficient evidence taken in the light most favorable to the State based on evidence presented by the State, the testimony of store employees where merchandise had been stolen, the testimony of investigating officers, and evidence presented by defendant through his testimony and that of his codefendant.

Appeal by Defendant from judgment entered 31 July 2003 by Judge James C. Spencer, Jr., in Superior Court, Alamance County. Heard in the Court of Appeals 18 October 2005.

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Attorney General Roy Cooper, by Assistant Attorney General Stormie D. Forte, for the State.

Bryan Emery Gates, Jr., for defendant-appellant.

WYNN, Judge.

If a larceny indictment names a corporation as the owner, “the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation.” *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 903 (1960) (citation omitted). In this case, Defendant Stephon Lavarrio Cave argues the indictment issued in his charge of larceny is defective because the named owner-entity, “N.C. FYE, Inc.”, does not import a legal entity capable of owning property. Following *Thornton*, we hold the larceny indictment was sufficient because the abbreviation “Inc.” imports the entity’s ability to own property. We further uphold the trial court’s denial of Defendant’s motion to dismiss the charges of larceny and possession of stolen goods.

The evidence at trial tended to show that on 21 December 2002, a customer in a mall observed individuals shoplifting. The customer reported the incidents to Steve Foust, an off-duty police officer working as mall security who conducted surveillance of the individuals, including Defendant. When Defendant and the individuals left the mall and returned to their vehicle, police officers detained them. Defendant, seated in the front passenger seat, responded by exiting the vehicle, using profanity and questioning the officers about why the vehicle had been stopped. The officers informed Defendant that the vehicle had been detained based on reports of shoplifting taking place within the mall.

Thereafter, the officers searched the vehicle and found items, including clothes, DVDs and CDs, from several stores. When Defendant and other passengers could not produce receipts or proofs of purchase for the items found in the vehicle, they were handcuffed. While detained, Defendant stated to the officers that the items in the vehicle belonged to him.

At trial, Defendant acknowledged that he initially accepted responsibility for the larceny because all of his co-defendants had prior records. Defendant stated at trial, “I said—I was the cool one. You know, I’m cracking jokes and stuff like that. I told them, I said, ‘Well, just put everything on me.’ I said, ‘It’s all mine’.”

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The jury returned a verdict of guilty for felony larceny, felony possession of stolen goods, and two counts of misdemeanor larceny. The trial court consolidated the felony larceny charge with one misdemeanor larceny charge and sentenced Defendant to five to six months imprisonment. The felony possession of stolen goods and the other misdemeanor larceny charge were continued on prayers for judgment.

[1] On appeal to this Court, Defendant first challenges the sufficiency of the indictment alleging larceny and possession of stolen items.¹ He alleges that the named-owner entity, “N.C. FYE, Inc.”, does not import an entity capable of owning property.² We disagree.

To convict a defendant of injury to personal property or larceny, the State must prove that the personal property was that “of another,” i.e., someone other than the person or persons accused. *See* N.C. Gen. Stat. § 14-160 (2004) (“If any person shall wantonly and willfully injure the personal property of another he shall be guilty”); *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981). Moreover, “an indictment for larceny must allege the owner or person in lawful possession of the stolen property.” *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). Thus, to be sufficient, an indictment for injury to personal property or larceny must allege the owner or person in lawful possession of the injured or stolen property.

“If the entity named in the indictment is not a person, it must be alleged ‘that the victim was a legal entity capable of owning prop-

1. We note that Defendant failed to contest the sufficiency of the indictment before the trial court. However, it is well established that, when a fatal defect is present in the indictment charging the offense, “a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.” *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). Accordingly, this issue is properly before the Court.

2. Before this matter came on for hearing on 18 October 2005, the State moved this Court to “take judicial notice of the Certificate of Existence issued by the North Carolina Secretary of State’s office showing there is a record for FYE, Incorporated and that it is recognized as a company authorized to own property and transact business in the State of North Carolina.” This Court granted that motion by Order dated 2 June 2005. Upon further consideration of that motion, we hold that the motion was improvidently granted as we deem the taking of judicial notice of this fact to be improper under Rule 201(b) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 201(b) (2004). *See also West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (stating that “a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or *is capable of demonstration by readily accessible sources of indisputable accuracy*.” (emphasis in original)).

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erty[.]’ ” *State v. Phillips*, 162 N.C. App. 719, 721, 592 S.E.2d 272, 273 (2004) (citation omitted). Further, “ ‘[i]f the property alleged to have been stolen . . . is the property of a corporation, the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation.’ ” *Thornton*, 251 N.C. at 662, 111 S.E.2d at 903 (citation omitted). Our courts have held that the words “corporation,” “incorporated,” “limited,” and “company,” are sufficient to import a corporation in an indictment. *See Thornton*, 251 N.C. at 662, 111 S.E.2d at 903-04; *see also State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299 (1977); *State v. Turner*, 8 N.C. App. 73, 173 S.E.2d 642 (1970). In addition, an abbreviation may be sufficient to import a corporation if the word for which the abbreviation stands imports a corporation. *State v. Woody*, 132 N.C. App. 788, 791, 513 S.E.2d 801, 803 (1999).

Here, the indictment for larceny named the property owner as “N.C. FYE, Inc.,” which is not a natural person. Significantly, the indictment did not allege that it was a legal entity capable of owning property. However, our Supreme Court has held “that the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment.” *Thornton*, 251 N.C. at 661, 111 S.E.2d at 903 (citation omitted). Moreover, the abbreviation “Inc.,” in the name “N.C. FYE, Inc.” is sufficient to import a corporation because the word for which the abbreviation stands, “Incorporation,” imports a corporation. *Woody*, 132 N.C. App. at 791, 513 S.E.2d at 803. Because the name, “N.C. FYE, Inc.,” imports a corporation, we find that the indictment was sufficient. This assignment of error is therefore without merit.

[2] Defendant next asserts the trial court erred in denying his motion to dismiss the two charges of misdemeanor larceny from the “Racing Edge” and “K.B. Toys,” and the charges of felony larceny and felony possession of stolen items from “N.C. FYE, Inc.,” due to insufficient evidence. We disagree.

“When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine ‘whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.’ ” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), *cert. denied*, — U.S.—, 161 L. Ed. 2d 122 (2005); *see also State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004); *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002).

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“‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted); *see also State v. Williams*, 355 N.C. 501, 578-79, 565 S.E.2d 609, 654 (2002). Moreover,

[a] ‘substantial evidence’ inquiry examines the sufficiency of the evidence presented but not its weight. The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary ‘contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.’

Garcia, 358 N.C. at 412-13, 597 S.E.2d at 746 (citations omitted). Additionally, “[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Butler*, 356 N.C. at 145, 567 S.E.2d at 140 (citation omitted). Where the evidence presented is circumstantial, on a defendant’s motion to dismiss, “‘the question for the court is whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy them beyond a reasonable doubt that the defendant is actually guilty.’” *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (emphasis in original) (citation omitted).

To convict a defendant of larceny, the State must prove the following elements: 1) taking personal property belonging to another; 2) carrying it away; 3) without the consent of the possessor; 4) with the intent to deprive the possessor of it permanently; 5) knowing that the taker is not entitled to it. N.C. Gen. Stat. § 14-72 (2004).

Defendant argues that his mere presence at the scene where the larceny occurred and being in the vehicle with the stolen items at the time they were recovered is not sufficient evidence of him taking the property. However, “the communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.” *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975).

Here, one of Defendant’s co-defendants testified that he told an investigating officer that Defendant was acting as a lookout while

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the others were stealing items from the stores. Furthermore, the store clerk at the “Racing Edge” identified Defendant as a person who entered the store with one or more of his co-defendants on 21 December 2002, and engaged in “distracting” behavior. Likewise, the store manager for FYE, Incorporated testified that Defendant entered the store twice on 21 December 2002, and appeared to be distracting the store employees’ attention while his co-defendants removed items from the store.

Moreover, officers searched the vehicle in which Defendant was riding and found items from several stores, including clothes, DVDs and CDs. Defendant and other passengers in the car were unable to show receipts or proofs of purchase for the items found in the vehicle. Store employees identified merchandise from their respective stores.

Indeed, Defendant’s own testimony supports the trial court’s dismissal of his motion to dismiss. When officers stopped Defendant and his co-defendants and searched their vehicle, Defendant told the officers that he was the responsible party, and not the co-defendants. During direct examination, Defendant testified that he was unaware of his co-defendants taking any items from the store. However, in later testimony, Defendant acknowledged when he knew his co-defendants were taking merchandise, he would leave the store, thus, contradicting his earlier testimony.

Based on evidence presented by the State, through the testimony of store employees from where merchandise had been stolen and investigating officers, as well as evidence presented by Defendant through his testimony and that of his co-defendant, taken in light most favorable to the State, there was sufficient evidence for the trial court to deny Defendant’s motion to dismiss and present the case to the jury.

No error.

Judges McGEE and GEER concur.

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STATE OF NORTH CAROLINA v. ELIZABETH PAIGE McMAHAN

No. COA05-211

(Filed 15 November 2005)

**Sentencing— aggravating factors—failure to submit to jury—
Blakely error**

The trial court erred by activating defendant's suspended sentences arising from embezzlement convictions when those sentences were unconstitutionally aggravated in violation of *Blakely v. Washington*, U.S. (2004), without defendant's stipulation or submission to and finding by the jury beyond a reasonable doubt, and the case is remanded for a new sentencing hearing. N.C. Gen. Stat. § 15A-1446(d)(18) permits a review of sentencing errors even though the defendant failed to object at trial.

Appeal by defendant from judgments entered 6 August 2004 by Judge Susan C. Taylor in Cabarrus County Superior Court. Heard in the Court of Appeals 19 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General Diane Martin Pomper, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant-appellant.

TYSON, Judge.

Elizabeth Paige McMahan ("defendant") appeals from judgments entered revoking her probation and activating her suspended sentences. We vacate and remand for a new sentencing hearing.

I. Background

Defendant was originally charged with twenty-eight counts of embezzlement. On 8 August 2003, defendant pled guilty to four consolidated counts of embezzlement, a Class H felony, pursuant to a plea agreement with the State in Guilford County.

The trial court sentenced defendant in the aggravated range to ten to twelve months incarceration on each of the four counts to run consecutively. The trial court found as an aggravating factor that "the offense involved the actual taking of property of great monetary value." This factor was not submitted to or found by a jury. The trial

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court also found as a mitigating factor that defendant had “accepted responsibility for the defendant’s criminal conduct.” The trial court suspended each active prison sentence and imposed thirty-six months intensive supervised probation.

On 8 March 2004, Probation Officer John L. Andrews issued probation violation reports alleging defendant: (1) had not completed her community service and failed to report to her community service supervisor; (2) had been away from home at times she was required to be home; (3) had failed to make some restitution payments; (4) was \$210.00 in arrears on her supervision fee; and (5) had failed to obtain and retain employment.

A probation revocation hearing was held on 2 August 2004. Defendant admitted violating the terms of her probation but denied and contested the willfulness of the violations. The trial court found that defendant had willfully violated the terms and conditions of her probation, revoked defendant’s probation, and activated her suspended sentences. Defendant appeals.

II. Issue

The issue on appeal is whether the trial court erred by activating defendant’s suspended sentences where those sentences were unconstitutionally aggravated in violation of the United States Supreme Court’s decision *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

III. Failure to Preserve and Waiver

The State contends defendant failed to preserve this issue for our review by her failure to object to the trial court’s judgments imposing an aggravated sentence upon the revocation of her probation. N.C.R. App. P. 10(b)(1) (2004) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . .”).

“*Blakely* errors arising under North Carolina’s Structured Sentencing Act are structural and, therefore, reversible per se.” *State v. Allen*, 359 N.C. 425, 444, 615 S.E.2d 256, 269 (2005). “Structural error is a rare form of constitutional error resulting from a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *Id.* at 441, 615 S.E.2d at 267 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L. Ed. 2d 302, 337 (1991)). “Structural errors are said to ‘defy’ harmless error

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review because they are ‘so intrinsically harmful as to require automatic reversal (i.e., ‘affect substantial rights’) without regard to their effect on the outcome.’ ” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 7, 144 L. Ed. 2d 35, 46 (1999)). Generally, constitutional errors must be “raised and passed upon” at trial to be preserved for appellate review. *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004). Our Supreme Court has held that “[s]tructural error, no less than other constitutional error, should be preserved at trial.” *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citing *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004)).

We consider defendant’s assignment of error under N.C. Gen. Stat. § 15A-1446, which provides:

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

....

(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, *or is otherwise invalid as a matter of law.*

N.C. Gen. Stat. § 15A-1446(d)(18) (2003) (emphasis supplied). This statute permits a review of sentencing errors even though the defendant failed to object at trial. *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003). This argument is overruled.

IV. Consent

The State also contends defendant consented to the entry of the enhanced sentences. We disagree.

“[N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.” *Blakely*, 542 U.S. at 310, 159 L. Ed. 2d at 417-18. The record filed in this appeal contains neither the plea transcript nor the trial court’s findings of aggravation and mitigation on file with the Guilford County Clerk of Superior Court. We take judicial notice of the plea transcript and the trial court’s findings of aggravation and mitigation and amend the record to include these documents *ex mero moto*. *West v. G. D.*

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Reddick, Inc., 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (The device of judicial notice is available to an appellate court “on any occasion where the existence of a particular fact is important.”); N.C.R. App. P. 9(b)(5) (2004) (“On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal.”). The plea transcript states as follows:

Defendant’s 28 counts of embezzlement will be consolidated for judgment into four class “H” felonies, to run consecutively. The sentences will be suspended on the condition that she will be placed on intensive supervised probation with the further special condition that she will pay restitution in the total amount of \$15,000.00. \$1,500.00 of this should be paid by bank check up [sic] the acceptance of this plea and the balance of \$13,500.00 will be paid un [sic] supervision of probation.

The record as amended does not indicate defendant stipulated to the relevant facts or consented to judicial fact finding of aggravating factors. This argument is overruled.

V. Activation of Defendant’s Suspended Sentences

Defendant argues that the trial erred in activating her suspended sentences where those sentences were unconstitutionally aggravated. We agree.

In *Apprendi v. New Jersey*, the United States Supreme Court ruled that a sentence enhancement imposed by the trial court violated the Fourteenth Amendment to the United States Constitution. 530 U.S. 466, 147 L. Ed. 2d 435 (2000). The Court held that the Fourteenth Amendment requires states to submit to a jury and prove beyond a reasonable doubt any fact, other than a prior conviction, which increases the maximum penalty for the crime charged. *Id.* at 476, 147 L. Ed. 2d at 446.

In June 2004, the United States Supreme Court reaffirmed *Apprendi* in *Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403, and defined “statutory maximum.”

[T]he “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding addi-

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tional facts, but the maximum he may impose *without* any additional findings.

Id. at 303, 159 L. Ed. 2d at 413-14 (citations omitted). In *Allen*, our Supreme Court applied the United States Supreme Court's decision in *Blakely* to the North Carolina Structured Sentencing Act. 359 N.C. at 438-39, 615 S.E.2d at 265.

Here, the trial court sentenced defendant to four consecutive aggravated terms of ten to twelve months incarceration on 8 August 2003. The aggravating factors were not submitted to or found by a jury, and were not stipulated to by defendant in her plea agreement. The trial court suspended defendant's sentences and imposed thirty-six months intensive supervised probation. At the probation revocation hearing, the trial court revoked defendant's probation and activated the aggravated sentences as "originally ordered." Defendant filed her notice of appeal in August 2004.

Our Supreme Court's opinions in *Allen* and *Speight* were certified on 1 July 2005. In *Allen*, our Supreme Court stated its holding applies to cases " 'in which the defendants have not been indicted as of the certification date of this opinion *and to cases that are now pending on direct review or are not yet final.*' " *Allen*, 359 N.C. at 450, 615 S.E.2d at 272 (emphasis supplied) (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001)). Our Supreme Court later stated in *State v. Speight*, that the "rationale in *Allen* applies to all cases in which (1) a defendant is constitutionally entitled to a jury trial, and (2) a trial court has found one or more aggravating factors and increased a defendant's sentence beyond the presumptive range without submitting the aggravating factors to a jury." 359 N.C. 602, 606, 614 S.E.2d 262, 264 (2005). The holdings in *Allen* and *Speight* apply here because defendant's assignment of sentencing error was pending on appeal on the date the *Allen* and *Speight* opinions were certified.

The trial court erred in activating sentences in the aggravated range without defendant's stipulation or submission of the aggravating factors to a jury to be proven beyond a reasonable doubt. *Allen*, 359 N.C. at 437, 615 S.E.2d at 265; *Speight*, 359 N.C. at 606, 614 S.E.2d at 264.

VI. Conclusion

The trial court erred in activating defendant's aggravated sentences that were imposed without defendant's stipulation or submis-

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[174 N.C. App. 591 (2005)]

sion to and finding by the jury beyond a reasonable doubt. We vacate the trial court's judgments and remand for a new sentencing hearing consistent with our Supreme Court's decision in *Allen*, 359 N.C. 425, 615 S.E.2d 256, and *Speight*, 359 N.C. 602, 614 S.E.2d 262.

Vacated and Remanded for New Sentencing Hearing.

Judges JACKSON and JOHN concur.

RONALD DARBO AND WIFE, LAURA DARBO, PLAINTIFFS V. OLD KELLER FARM
PROPERTY OWNERS' ASSOCIATION, INC., DEFENDANT

No. COA04-1711

(Filed 15 November 2005)

**Highways and Streets— planning approval—plat—upgrade to
county road from private drive**

The trial court had sufficient evidence to support its conclusions that a road labeled “right-of-way private drive” on the recorded plat could be upgraded to provide access to acreage which plaintiffs wished to subdivide. The long-time director of the Planning Department testified that it was the usual custom of the Planning Department to upgrade private drives to county standard roads, and that developers typically left forty-five foot rights-of-way on plats to preserve options for future development.

Appeal by defendant from order and judgment entered 1 October 2004 by Judge Charles C. Lamm in Watauga County Superior Court. Heard in the Court of Appeals 24 August 2005.

*Di Santi Watson Capua & Wilson, by Frank C. Wilson, III, for
the plaintiffs-appellees.*

*The Vetro Law Firm, P.C., by M. Shaun Lundy, for defendant-
appellant.*

JACKSON, Judge.

On 11 February 2002, Ronald and Laura Darbo (“plaintiffs”) purchased two tracts of land in Watauga County, North Carolina,

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pursuant to a foreclosure sale. They recorded their deeds on 26 March 2002. Tract I ("Lot 27") consisted of Lot 27, which is located in Section II of Old Keller Farm, as evidenced by a recorded plat. Tract II ("Darbo lot") consisted of 8.873 acres of land which is an undeveloped and undivided piece of land that is adjacent to Lot 27, and is also noted on the recorded plat.

The recorded plat shows a sixty foot wide road, "Keller Road," in the area designated as Section I of Old Keller Farm, that extends into the Section II of the subdivision. Where Keller Road continues into Section II of the subdivision, it is reduced to a forty-five foot wide road, and is labeled on the plat as "45.00' right-of-way private drive." This smaller road extends along one side of Lot 27, and continues to the Darbo lot.

After purchasing the two tracts of land, plaintiffs presented a preliminary plat to the Watauga County Planning and Inspection Department ("Planning Department") in September 2002, proposing to subdivide the Darbo lot into five new lots. Plaintiffs proposed that the "45.00' right-of-way private drive" would service Lot 27, along with the five proposed subdivided lots. Upon learning of plaintiffs' proposed subdivision of the Darbo lot, the Old Keller Farm Property Owners' Association, Inc. ("defendants") notified the Planning Department that it disputed whether plaintiffs had a sufficient right-of-way to allow the subdivision as proposed in the preliminary plat.

In a letter dated 11 September 2002, the Watauga County Planning Board notified plaintiffs that "when there has been a dispute regarding right-of-way, . . . the Planning Board has taken the position that the parties resolve the dispute themselves, rather than ask the County to do so, as these are actually private legal issues over which the courts, not the County, have jurisdiction." The Planning Department thus refused to consider plaintiffs' subdivision plans until the matter of the forty-five foot "right-of-way private drive" was resolved in some other fashion.

On 5 March 2004, plaintiffs filed an action seeking a declaratory judgment that the forty-five foot "right-of-way private drive" was an easement over and across the privately maintained Old Keller Farm Road, for ingress, egress, and regress to the Darbo lot. After reviewing the recorded plat, county ordinances, and hearing testimony from Joe Furman, who has been the Director of Watauga County Planning and Inspections Department for twenty years, the court concluded as a matter of law that the forty-five foot road met the width require-

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ments of a "County Standard Road." The court also concluded that the road could be upgraded and "the custom of the county is to allow subdivisions to be developed in stages and such upgrades to occur, provided all the other provisions of the county subdivision ordinance have been satisfied." The trial court then ordered that plaintiffs have a right-of-way forty-five feet wide along the border of Lot 27, which also would serve as means of ingress, egress, and regress for the Darbo lot. The court ordered that the forty-five foot right-of-way may be upgraded to a "County Standard Road," provided that all other requirements of the Watauga County Ordinance to Govern Subdivisions and Multi Unit Structures are met and approved by the various government entities that are required to do so. From this order defendants appeal.

Before addressing defendant's arguments on appeal, we wish to note that the issues presented in this case are issues that are properly addressed to and resolved by county or municipal planning and inspections departments as an initial matter, rather than our courts.

Defendants argue that the trial court committed error when it disregarded the plain and unambiguous language of the recorded plat showing Section II of Old Keller Farm, and the Watauga County Ordinance to Govern Subdivision and Multi-Unit Structures ("County Ordinance").

As previously stated, the recorded plat designated the road in question as "45.00' right-of-way private drive." The County Ordinance defines a "private driveway" as "[a] roadway serving three (3) or fewer lots, building sites or other divisions of land and not intended to be public ingress or egress." Watauga County, N.C., Ordinance to Govern Subdivisions and Multi-Unit Structures art. IV, § 41.10 (2004). The County Ordinance defines "right-of-way" as "[a] strip of land designated by the owner or other authority or acquired by other over which a person may legally pass, and on which may be constructed a road or utilities." *Id.* at art. IV, § 41.13. Pursuant to the County Ordinance, all lots in a subdivision must have direct vehicular access to a state or county standard road. *Id.* at art. VII, § 72.016. The County Ordinance also states that a county standard road must be no less than forty-five feet wide, and the ordinance does not limit the number of lots a county standard road may service. *Id.* at art. VII, § 71.021. Defendants argue the recorded plat clearly designates the road as a "private drive," thereby limiting the number of lots the road may service to three, which is below the number of lots that plaintiffs wish to have the road service.

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The court heard testimony from Joe Furman of the Planning Department, in which he stated the private driveway that plaintiffs currently have, is adequate in width for it to be improved to a county standard road. Mr. Furman further testified that it is common practice for developers to provide a forty-five foot right-of-way on plats accessing undeveloped land, in order to leave open their options for future development. In addition, he stated that the designation on the recorded plat showing the road as a "private drive" "is a disclosure that it is private as opposed to public," and that such designation does not restrict the use of the property. All parties agree that there are no recorded restrictive covenants which would prohibit development of the Darbo lot.

Our court has held that when a recorded instrument is plain and unambiguous, its construction is a matter of law. *Lovin v. Crisp*, 36 N.C. App. 185, 243 S.E.2d 406 (1978). In the instant case, the recorded plat map shows a "right-of-way private drive." Given the testimony presented at trial by Joe Furman of the Watauga County Planning Department, we do not find this designation is plain and unambiguous. Although plaintiffs clearly have a right-of-way, it is unclear whether the right-of-way was intended to be restricted as a private driveway thereby limiting development of the Darbo lot.

With respect to the County Ordinance, our courts have held that "[w]here an issue of statutory construction arises, the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such construction is entitled to 'great consideration.'" *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973) (quoting *Gill v. Commissioners*, 160 N.C. 176, 76 S.E. 203 (1912)). "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Knight v. Town of Knightdale*, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004) (quoting *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965)). Further, "[t]he basic rule of statutory construction 'is to ascertain and effectuate the intention of the municipal legislative body.'" *Id.* (quoting *George v. Town of Edenton*, 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978)). The best indication of the municipal legislative body's intent is the "language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Id.* (quoting *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980)). Where an "ordinance is clear and unambiguous, its plain meaning will be enforced. An interpretation

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that results in illogical or absurd consequences should be avoided.” *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 549, 344 S.E.2d 821, 824 (1986) (internal citation omitted).

In the present case, the County Ordinance in question is not plain and unambiguous. Rather, the ordinance lacks specificity regarding roads designated as rights-of-way, and the limitations which may be placed on these roads as well as an individual's subsequent ability to modify the designation. Although the Watauga County Planning Board declined to resolve the issue on behalf of the County due to the disagreement between the parties, the trial court heard testimony from the long-time director of the Planning Department, in which he clearly stated that it is the usual custom of the Planning Board to upgrade private drives to county standard roads. He further testified that there are no ordinances prohibiting this upgrade, and that unless there is some private legal prohibition, such as a restrictive covenant, the private drive may be upgraded provided it satisfies the necessary width requirements. Furman stated that developers typically will leave forty-five foot rights-of-way on their plats, accessing undeveloped parts of the land, so that future development will not be limited by the width of the road.

When the trial court was presented with a plat and a county ordinance that were not plain and unambiguous, the trial court, sitting without a jury, had the duty to make its own findings of fact, which if supported by evidence, are conclusive on appeal. *Williams v. Pilot Life Insur. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). In the instant case, the trial court was presented with sufficient evidence showing that it was the County's custom to upgrade private driveways to county standard roads in order to further development. The court also heard testimony from the original developer indicating that the road in question likely was labeled as such in order to hold open the options for the remaining eight acres, which later became the Darbo lot. Therefore, were the trial court to have applied the interpretation of the plat and ordinances as defendants would prefer, the results would be illogical. Their interpretation would limit the Darbos' ability to subdivide the eight acres of the Darbo lot into no more than two lots. The trial court properly gave deference to the Watauga Planning Board, which actually administers and executes the ordinances. Accordingly we hold that there was sufficient evidence to support the trial court's findings of fact, and the court's conclusions of law were similarly supported by these findings of fact.

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Affirmed.

Judges MCGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ANTHONY LEON HOOVER, DEFENDANT

No. COA05-64

(Filed 15 November 2005)

1. Constitutional Law— right to counsel—motion to withdraw waiver of counsel

The trial court did not err in a first-degree statutory rape case by denying defendant's motion to withdraw his waiver of counsel, because defendant failed to clearly state a request to withdraw his waiver of counsel and failed to provide a reason for the delay in requesting the withdrawal constituting good cause.

2. Evidence— denial of motion to introduce additional evidence—failure to show prejudice

The trial court did not abuse its discretion in a first-degree statutory rape case by refusing to reopen the trial to permit defendant to introduce additional evidence, because: (1) evidence about defendant's work schedule had already been admitted; and (2) defendant failed to show how he was prejudiced by the trial court's refusal to allow an additional witness to testify about driving him to and from work.

3. Constitutional Law— right to counsel—waiver of counsel—pro se representation

The trial court did not err in a first-degree statutory rape case by permitting defendant to waive his right to counsel and allowing him to proceed pro se, because: (1) the trial court fully complied with N.C.G.S. § 15A-1242 before allowing defendant to waive his right to counsel; and (2) the court's findings of fact support its decision to permit defendant to waive his right to counsel and proceed pro se.

4. Criminal Law— competency to stand trial—waiver of right to competency hearing

The trial court did not err in a first-degree statutory rape case by determining that defendant was competent to stand trial,

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because: (1) the court received a report from a forensic examiner stating that defendant was competent to stand trial, and the court ruled as such; and (2) by his failure to challenge the court's ruling, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002(b).

Appeal by defendant from judgment entered 19 August 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 22 September 2005.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.

HUDSON, Judge.

Defendant Anthony Leon Hoover was charged with first-degree statutory rape. On 10 January 2003, the court appointed attorney David Liner to represent defendant. Liner withdrew as counsel on 7 October 2003, and the court assigned public defender Elizabeth Toomes as counsel. Toomes moved for an examination of defendant to determine his competency. On 10 May 2004, defendant requested Toomes be removed as his counsel; the court removed Toomes and appointed attorney H.G. Davis to represent defendant. On 13 August 2004, the court allowed Davis to withdraw and granted defendant's request to represent himself, with public defender Toomes as standby counsel. On 3 August 2004, the court heard and denied a number of motions from defendant, including one to replace Toomes as counsel. At the 16 August 2004 criminal session of the Superior Court in Forsyth County, defendant proceeded *pro se* and a jury convicted him of first-degree statutory rape. The court sentenced defendant to 312 to 384 months in prison, and he appeals. As discussed below, we see no error.

The evidence tended to show that in 1999 the eleven-year-old victim, B.R., lived with her aunt. She accused defendant, her mother's former live-in boyfriend, of molesting her in November 1998 when he lived with B.R. and her mother. B.R. told her aunt that defendant had come into the room where she was watching television and had intercourse with her, threatening her if she told anyone. Defendant's evidence showed that he lived with B.R. and her mother only from February through April 1998, and lived at another address during November of that year.

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[1] Defendant first argues that the court erred in denying defendant's motion to withdraw his waiver of counsel. We do not agree.

A waiver of counsel or decision to proceed *pro se* is "good and sufficient until the trial [is] finally terminated, 'unless the defendant himself makes known to the court that he desires to withdraw the waiver' " and makes a showing that the change of mind to proceed (with or without an attorney) was for some "good cause." *State v. Clark*, 33 N.C. App. 628, 630, 235 S.E.2d 884, 886 (1977) (quoting *State v. Smith*, 27 N.C. App. 379, 380-81, 219 S.E.2d 277, 279 (1975)). To hold otherwise would allow a defendant " 'to control the course of litigation and sidetrack the trial.' " *Id.*

State v. Jackson, 128 N.C. App. 626, 629, 495 S.E.2d 916, 919, *review dismissed as improvidently granted*, 349 N.C. 287, 507 S.E.2d 37 (1998). Where "[t]he trial court was aware of [a] defendant's desire for assistance of counsel, but denied the request based on defendant's prior waiver[.]" the denial was error and the defendant was entitled to a new trial. *State v. Sexton*, 141 N.C. App. 344, 347, 539 S.E.2d 675, 677 (2000). Several features of *Sexton* make it distinguishable from the case before us now. The trial court there failed to complete the AOC form entitled "Waiver of Counsel." *Id.* In addition, the defendant in *Sexton*, who asked to withdraw his waiver on the day of trial, gave the trial court "good cause," explaining that the length of sentence he faced had caused him to reconsider his attempt to save money by refusing the assistance of counsel. *Id.*

Here, defendant had four counsel appointments and requested change of counsel four times in approximately eighteen months. He sought to withdraw his waiver of counsel two weeks prior to the beginning of trial. The record before us reveals that defendant complained about the performance of his standby counsel Toomes, alleging in a motion that she was providing him ineffective assistance of counsel, which the court treated as a request for the appointment of new counsel. The court denied defendant's request, stating "you indicated you wanted to represent yourself, so I'm not going to appoint another lawyer, you either have Ms. Toomes as your standby counsel or no lawyer at all. Do you want Ms. Toomes to stay as your standby counsel?" Defendant responded "yes, I'm going to beat the case anyway." Unlike the circumstances in *Sexton*, defendant here failed to clearly state a request to withdraw his waiver of counsel and failed to provide a reason for the delay in requesting the withdrawal constituting "good cause." We overrule this assignment of error.

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[2] Defendant next argues that the court abused its discretion by refusing to reopen the trial to permit defendant to introduce additional evidence. We disagree.

At the conclusion of the trial, the court asked defendant whether he wished to call any further witnesses or introduce any additional evidence. Defendant said no. Following motions, the charge conference, and the closing arguments, court recessed for the evening. The next morning, defendant's sister asked the court if an additional witness, Michael Reese, could testify about driving defendant to and from work. The court did not allow the evidence to be reopened. Defendant contends this ruling was an abuse of the court's discretion.

N.C. Gen. Stat. § 15A-1226(b) provides that "[t]he judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict." Because there is no constitutional right to have one's case reopened, the decision to reopen a case is strictly within the trial court's discretion. *State v. Shelton*, 53 N.C. App. 632, 648, 281 S.E.2d 684, 695 (1981), *appeal dismissed*, 305 N.C. 306, 290 S.E.2d 707 (1982). Defendant cites *State v. Lang* for the proposition that "there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). In addition, "[w]here the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter." *Id.* In *Lang*, however, the jury had requested a transcript of witness testimony while deliberating, which request the trial court refused, believing that it did not have the authority to provide the transcript. *Id.* *Lang* is inapposite to the case before us. In addition, defendant fails to show that the court abused its discretion in refusing to reopen the trial to allow Mr. Reese to testify. Because evidence about defendant's work schedule had already been admitted, defendant fails to show how he was prejudiced by the trial court's refusal to allow Mr. Reese to testify about driving him to and from work. We overrule this assignment of error.

[3] Defendant also argues that the court erred in permitting him to waive his right to counsel and allowing him to proceed *pro se*. We disagree.

Defendant contends that the court should have inquired into his literacy, competency, and ability to read before permitting him to waive his right to counsel. Our Supreme Court has recently reaffirmed that:

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a defendant has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. However, before allowing a defendant to waive in-court representation by counsel, . . . the trial court must insure that constitutional and statutory standards are satisfied. First, defendant's waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Second, in order to satisfy constitutional standards, the trial court must determine whether defendant knowingly, intelligently, and voluntarily waives his right to counsel. In order to determine whether the waiver meets [this constitutional] standard, the trial court must conduct a thorough inquiry.

State v. Fulp, 355 N.C. 171, 174-75, 558 S.E.2d 156, 158-59 (2002) (internal citations and quotation marks omitted). The constitutional requirements of waiving the right to counsel are satisfied by compliance with N.C. Gen. Stat. § 15A-1242, which provides that:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2001). In addition, the Court in *Fulp* held that the trial court's failure to "expressly and specifically state in his findings of fact that he considered defendant's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged is not of sufficient consequence to warrant reversal of the court's order." *Fulp*, 355 N.C. at 177, 558 S.E.2d at 160 (internal quotation marks omitted). The record reveals that the court fully complied with the statutory requirements before allowing defendant to waive his right to counsel. The court's findings of fact support its decision to permit defendant to waive his right to counsel and proceed *pro se*. This assignment of error is without merit.

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[4] In his final assignment of error, defendant argues that the court erred in determining that he was competent to stand trial. We disagree.

The court received a report from a forensic examiner, stating that defendant was competent to stand trial, and the court ruled as such.

Pursuant to the plain language of section 15A-1002(b)(3), the trial court must hold a hearing to determine the defendant's capacity to proceed *if* the question is raised. However, this Court has recognized that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.

State v. King, 353 N.C. 457, 466, 546 S.E.2d 575, 584 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002) (citing N.C. Gen. Stat. § 15A-1002(b)(3) (internal citations and quotation marks omitted)). By his failure to challenge the court's ruling, defendant waived his statutory right to a competency hearing under N.C. Gen. Stat. § 15A-1002(b). *Id.* at 466, 546 S.E.2d at 585. We overrule this assignment of error.

No error.

Judges ELMORE and SMITH concur.

DEBBIE C. WILLIAMS, AND ASHLEY NICOLE WILLIAMS v. NATIONWIDE MUTUAL
INSURANCE COMPANY, DEFENDANT

No. COA04-995

(Filed 15 November 2005)

**Insurance— underinsured motorist coverage—renewed older
policy—no opportunity to select or reject**

A total failure on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by the policy owner. Such failure should not invoke the minimum limits established by N.C.G.S. § 20-279.21(b)(4) and shield the insurer

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from additional liability, and the trial court did not err by determining that the insured was entitled to UIM coverage of \$1 million per person and \$1 million per accident.

Appeal by defendant from a judgment entered 27 May 2004 by Judge Russell J. Lanier, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 9 March 2005.

White & Allen, P.A., by Matthew S. Sullivan, Thomas J. White, III, and Gregory E. Floyd, for plaintiff-appellee.

George L. Simpson, III, for defendant-appellant.

BRYANT, Judge.

Ashley Nicole Williams and her mother, Debbie C. Williams, (plaintiffs) filed an action for declaratory judgment seeking a determination of the amount of underinsured motorist coverage (UIM) available to them under an automobile liability policy issued by Nationwide Mutual Insurance Company (defendant) to David and Mary Ann Canady. Both parties filed motions for summary judgment. The trial court granted plaintiffs' motion for summary judgment, determining the insurance policy provided UIM coverage with limits of \$1,000,000.00 per person and \$1,000,000.00 per accident. For the reasons discussed herein, we affirm the trial court's ruling.

Facts

This matter was presented to the trial court upon stipulated facts. On 17 July 2001, Ashley Nicole Williams (Ashley) was injured in an automobile accident while riding as a passenger in a 1992 Dodge automobile owned by David Canady and operated by his son, Jeremy Canady. Jeremy's negligence was the sole proximate cause of the accident and Ashley's injuries. At the time of the accident Ashley was a minor and her mother, acting as her guardian, incurred expenses for her daughter's medical treatment until Ashley reached the age of majority.

On the date of the accident, the Canady vehicle was insured under an automobile policy issued by Nationwide with bodily injury coverage of \$50,000.00 per person and \$100,000.00 per accident. The parties stipulated that plaintiffs "are insureds for purposes of the Canady policy's UIM coverage." The dispute in this matter concerns the amount of UIM coverage available under the Canady policy based upon the following stipulated facts:

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6. . . . The Canady policy was issued to Mr. and Mrs. Canady initially in 1984, and, except for periods of time when the policy was cancelled due to the Canadys' failure to pay the premium, it remained in effect through July 17, 2001, either through new, reinstated or renewal policies. The Canady policy was last renewed prior to the July 17, 2001 accident on June 12, 2001 for the policy period from June 12, 2001 to December 12, 2001. Neither Mr. Canady nor Mrs. Canady were offered by Nationwide or its authorized agent an opportunity to select or to reject UIM limits greater than their liability limits at any time prior to July 17, 2001. The option to select or reject UIM limits that are greater than the policy's liability limits was not available to insureds in North Carolina at any time prior to the effective date of the 1991 amendments to the UIM statute. Neither Mr. Canady nor Mrs. Canady signed a North Carolina Rate Bureau UM/UIM selection/rejection form for the Canady policy at any time prior to July 17, 2001.

Procedural History

Plaintiffs filed their Complaint in the Superior Court of Lenoir County on 1 March 2004, seeking a declaratory judgment of the amount of UIM coverage available to them under the Canady insurance policy. On 14 May 2004, plaintiffs and defendant filed cross-motions for summary judgment. These motions were heard by the Honorable Russell J. Lanier, Jr. on 17 May 2004. On 27 May 2004, the trial court granted plaintiffs' motion for summary judgment, determining the applicable UIM limits under the Canady insurance policy to be \$1,000,000.00 per person and \$1,000,000.00 per accident. Defendant appeals.

In its sole assignment of error, defendant contends the trial court erred in granting plaintiffs' motion for summary judgment and denying its motion for the same. Under Rule 56(c) of the Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). Because the parties have stipulated to the applicable facts, we consider only whether the trial court properly found plaintiffs were entitled to judgment as a matter of law. "Any error made in interpreting a statute is an error of law" *In re Appeal of North Carolina Sav. & Loan League*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981).

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Section 20-279.21(b)(4) of the North Carolina General Statutes governs UIM coverage. The version of this statute in effect in 1984, when the Canady policy was first issued, provided that UIM limits “were not to exceed the policy limits for automobile bodily injury liability as specified in the owner’s policy.” N.C. Gen. Stat. § 20-279.21(b)(4) (1983). The General Assembly amended the statute in 1991 to provide that the amount of UIM coverage was “not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars (\$1,000,000) **as selected by the policy owner.**” 1991 N.C. Sess. Laws 646, § 2 (emphasis added). The 1991 amendment also added the following language to the statute: “The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision.” *Id.* The General Assembly subsequently amended this statute in 1992, inserting the following language: “If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy.” 1991 N.C. Sess. Laws 837, § 9.

Defendant relies on *State Farm Mut. Auto Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782 (1999), in an attempt to show the statutory limits of N.C. Gen. Stat. § 20-279.21(b)(4) apply. In *Fortin*, the insured had initially rejected underinsured motorist (UIM) coverage and the policy was later renewed with the continuing rejection of UIM coverage. *Fortin*, at 266, 513 S.E.2d at 783. However, the forms provided to the insured at renewal merely contemplated a renewal of a previously selected coverage and did not offer the insured a fresh choice to reject UIM coverage or select different coverage limits as required by recent amendments to N.C.G.S. § 20-279.21(b)(4). *Fortin*, at 270-71, 513 S.E.2d at 785. The failure of the forms to provide for a new choice to reject or select different UIM coverage was interpreted by our Supreme Court to result in an invalid rejection of UIM coverage. *Id.* “Therefore, because there was neither a valid rejection of UIM coverage nor a selection of different UIM coverage limits,” the statutory coverage limits established in N.C.G.S. § 20-279.21(b)(4) applied. *Fortin*, at 271-72, 513 S.E.2d at 786. However, a lack of a fresh choice concerning the selection of UIM coverage in a renewal form, as occurred in *Fortin*, is not equivalent to the situation at hand where there has been a total failure to provide the insured with an opportunity to select UIM coverage.

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“Underinsured coverage is mandatory unless rejected by the insured in accordance with the provisions of N.C. Gen. Stat. § 20-279.21.” *Maryland Cas. Co. v. Smith*, 117 N.C. App. 593, 598, 452 S.E.2d 318, 320 (1995). The statutory limitations for UIM coverage established in N.C.G.S. § 20-279.21(b)(4) take effect if the named insured does not reject UIM coverage or does not select UIM coverage limits different than the bodily injury liability coverage contained in the policy. N.C.G.S. § 20-279.21(b)(4) (2001). Here, however, the insured was not given the opportunity to reject or select different coverage limits. If N.C.G.S. § 20-279.21(b)(4) were to apply in this situation, insurers would be permitted to establish default UIM coverage simply by failing to provide the proper rejection/selection forms to their clients. This would be contrary to the requirements set forth in the statute: “Such owner’s policy of liability insurance: (4) Shall . . . provide underinsured motorist coverage . . . **as selected by the policy owner.**” *Id.* (emphasis added). The statute clearly establishes that the insured must be given the initial opportunity to reject or select different policy limits. *Maryland Cas.*, at 598, 452 S.E.2d at 321; *see also, Fortin*, at 268, 513 S.E.2d at 784 (“[A]n insurer is required to offer its insureds the opportunity to select UIM coverage limits . . . and to obtain a valid rejection or selection of different UIM coverage limits . . .”).

While N.C. Gen. Stat. § 20-279.21(b)(4) does not address the applicable default policy limits where the insured is not given the opportunity to select or reject the UIM policy limits, this Court has held “[a]ny ambiguity in the Financial Responsibility Act (Act), which includes section 20-279.21(b)(4), must be liberally construed to effectuate the Act’s remedial purpose—protecting innocent victims of automobile accidents from financially irresponsible motorists.” *Metro. Prop. & Cas. Ins. Co. v. Caviness*, 124 N.C. App. 760, 763, 478 S.E.2d 665, 668 (1996) (citing *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444 (1967)). In *Caviness*, this Court held the statute as written prior to the 1992 amendments was ambiguous as to the amount of UIM coverage available to an insured who failed to select or reject UIM coverage, and, in order to protect innocent victims, the insured was entitled to the highest available limit of UIM coverage of \$1,000,000. *Caviness*, at 763-65, 478 S.E.2d at 667-68.

A total failure on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by the policy owner. Such

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a failure should not invoke the minimum UIM coverage limits established in N.C.G.S. § 20-279.21(b)(4) and shield the insurer from additional liability. So doing would violate the purpose of the statute to protect the insured and allow them to choose their policy benefits. Accordingly, we find no error committed by the trial court and affirm its order granting plaintiffs' motion for summary judgment.

Affirmed.

Judges McGEE and STEELMAN concur.

DOROTHY HAWLEY, PLAINTIFF V. JAMES HOBGOOD, DEFENDANT

No. COA05-115

(Filed 15 November 2005)

1. Appeal and Error— appealability—change of venue for incorrect county denied—substantial right

The denial of a motion for change of venue for filing the action in an incorrect county affects a substantial right and is immediately appealable.

2. Venue— nine-month delay between motion to change and hearing—no waiver

A motion for a change of venue was not waived by a nine-month delay between the motion and the notice of hearing where plaintiff did not file additional motions or requests for continuances before filing his notice of hearing.

3. Venue— action not in county of either party—improper

Venue was not proper where neither party was a resident of the county where the action was filed. On remand, the trial court has no discretion; the action must be moved to the proper county.

Appeal by Defendant from order entered 30 September 2004 by Judge Narley Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 11 October 2005.

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Allen & Pinnix, P.A., by M. Jackson Nichols and Angela Long Carter, for plaintiff-appellee.

Ligon and Hinton, by George Ligon, Jr., for defendant-appellant.

WYNN, Judge.

“[T]he trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.” *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975). In this case, Defendant timely filed his written Motion for Change of Venue on the basis that the action was filed in the wrong county. As we agree with Defendant, we reverse and remand this case to the trial court.

On 14 October 2003, Plaintiff Dorothy Hawley filed a Complaint in Wake County, North Carolina alleging assault, battery, and intentional infliction of emotional distress against Defendant James Hobgood. Ms. Hawley declared in the Complaint that she was a resident of Vance County, North Carolina, and that Mr. Hobgood was a resident of Granville County, North Carolina. All of the events alleged in the Complaint occurred in Granville County, North Carolina.

On 18 December 2003, Mr. Hobgood filed his Answer and Motion for Change of Venue. Mr. Hobgood’s third defense was for removal of the action due to improper venue as neither party was a resident of Wake County.

Ms. Hawley submitted requests for discovery, to which Mr. Hobgood partially answered. On 21 July 2004, Ms. Hawley filed a Motion to Compel. On 22 September 2004, Mr. Hobgood filed a Notice of Hearing for Motion to Change Venue. Following the hearing, by Order filed 30 September 2004, the trial court denied Mr. Hobgood’s Motion to Change Venue concluding that “Defendant has waived his right to change venue by his failure to press his Motion[.]” From this Order, Mr. Hobgood appeals.

[1] Preliminarily, we address Ms. Hawley’s motion to dismiss this appeal because it is interlocutory.¹ Indeed, an order denying change

1. An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950); *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002).

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of venue is interlocutory as it does not dispose of the case. *See Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381; *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513. But while in general there is no right to appeal from an interlocutory order, there are two exceptions to that rule: (1) when there has been a final determination as to one or more of the claims and the trial court certifies that there is no just reason to delay the appeal, or (2) if delaying the appeal would prejudice a substantial right. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2004); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; *Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993).

Here, the trial court made no such certification so we address the question of whether “the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.” *N.C. Dep’t of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal under sections 1-277(a) and 7A-27(d)(1) of the North Carolina General Statutes. *See id.* “The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party.” *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513.

In her Motion to Dismiss Appeal, Ms. Hawley cites to *Furches v. Moore*, 48 N.C. App. 430, 269 S.E.2d 635 (1980) and *Kennon v. Kennon*, 72 N.C. App. 161, 323 S.E.2d 741 (1984), to support her argument that the denial of a motion to change venue does not affect a substantial right. Both *Furches* and *Kennon* addressed motions for change of venue under section 1-83(2) of the North Carolina General Statutes, for the convenience of witnesses. *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743; *Furches*, 48 N.C. App. 430, 260 S.E.2d 635. Here, Mr. Hobgood’s Motion for Change of Venue was under section 1-83(1) of the North Carolina General Statutes, county designated not proper. N.C. Gen. Stat. § 1-83(1) (2004). Therefore, *Furches* and *Kennon* are inapplicable.

Motions for change of venue because the county designated is not proper affect a substantial right and are immediately appealable. *Dixon v. Haar*, 158 N.C. 286, 288, 74 S.E. 1, 2 (1912); *McClure Estimating Co. v. H. G. Reynolds Co., Inc.*, 136 N.C. App. 176, 178-79, 523 S.E.2d 144, 146 (1999); *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984) (“[A]n erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be cor-

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rected if no appeal was allowed before the final judgment.”). Accordingly, Ms. Hawley’s Motion to Dismiss Appeal is denied.

[2] In his appeal, Mr. Hobgood argues that the trial court erred in denying his Motion for Change of Venue as he did not waive his objection to venue. We agree.

Section 1-83 of the North Carolina General Statutes provides for a change of venue. Section 1-83 states in pertinent part:

If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

- (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83. “[T]he trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.” *Swift & Co.*, 26 N.C. App. at 495, 216 S.E.2d at 465; *see also Nello L. Teer Co. v. The Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55-56 (1952); *Centura Bank v. Miller*, 138 N.C. App. 679, 681, 532 S.E.2d 246, 248 (2000); *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (“The provision in N.C.G.S. § 1-83 that the court ‘may change’ the place of trial when the county designated is not the proper one has been interpreted to mean ‘must change.’”).

“Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (3) Improper venue or division[.]” N.C. Gen. Stat. § 1A-1, Rule 12(b) (2004). Here, Mr. Hobgood made a written motion in conjunction with his answer to change venue. Therefore, he timely made a written motion to change venue. N.C. Gen. Stat. § 1-83(1).

“However, since venue is not jurisdictional it may be waived by express or implied consent, and a defendant’s failure to press his motion to remove has been found to be a waiver.” *Miller*, 38 N.C. App.

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at 97, 247 S.E.2d at 279 (internal cites omitted). The question then is whether Mr. Hobgood's nine month delay between filing his Motion to Change Venue and filing Notice of Hearing, is a failure to pursue his motion sufficient to constitute a waiver.

In *Miller*, this Court held that the defendant waived her right to change venue when after a year long delay before the first hearing, she requested a continuance, and then failed to appear at the second hearing. *Miller*, 38 N.C. App. at 98, 247 S.E.2d at 280.

In *Swift & Co.*, this Court held that the defendant did not waive its right to change of venue. *Swift & Co.*, 26 N.C. App. at 495, 216 S.E.2d at 465. The defendant did not pursue its motion for change of venue until the plaintiff filed a motion for sanctions, a delay of four months. *Id.*

Like in *Swift & Co.*, Mr. Hobgood timely filed his Motion for Change of Venue, but did not pursue his motion until Ms. Hawley filed a Motion to Compel. But "[t]he fact that it was plaintiff's motion which prodded defendant[] into action is immaterial." *Swift & Co.*, 26 N.C. App. at 495, 216 S.E.2d at 465. The nine month delay, standing alone, does not constitute an implied waiver by Mr. Hobgood. This case is not analogous to *Miller*, where the defendant waited a year, filed a motion for a continuance with the court, and then failed to appear. *Miller*, 38 N.C. App. at 98, 247 S.E.2d at 280. Here, from the record it does not appear that Mr. Hobgood filed any additional motions or requests for continuances with the trial court before filing his Notice of Hearing. As Mr. Hobgood timely filed a demand for change of venue, he was entitled to show that venue was improper. *See Swift & Co.*, 26 N.C. App. at 495, 216 S.E.2d at 465.

[3] Section 1-82 of the North Carolina General Statutes sets out the method of determining the proper venue, stating in pertinent part, "the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement" N.C. Gen. Stat. § 1-82 (2004). Ms. Hawley declared in the Complaint that she was a resident of Vance County, North Carolina, and that Mr. Hobgood was a resident of Granville County, North Carolina. Therefore, Wake County was not the proper venue.

As the trial court has no discretion in ordering a change of venue if it appears that the action has been brought in the wrong county, here, on remand the trial court must remove the action to the proper county. *See Nello L. Teer Co.*, 235 N.C. at 743, 71 S.E.2d at 55-56.

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Reversed and remanded.

Judges McGEE and GEER concur.

DEBORAH RAINEY, PLAINTIFF v. ST. LAWRENCE HOMES, INC., BRAXTON DEVELOPMENT COMPANY, L.L.C., M.T. MURPHY CONSTRUCTION CO., INC., AND PENNY SEKADLO D/B/A PENNY ENGINEERING DESIGN, DEFENDANTS

No. COA04-1571

(Filed 15 November 2005)

1. Nuisance; Trespass— run-off from new development—summary judgment

Summary judgment was correctly granted for two defendants, but not the third, on nuisance and trespass claims arising from water running onto plaintiff's property from a new subdivision. Plaintiff's forecast of evidence was that St. Lawrence's development contributed to the unreasonable increase in the volume of water and that plaintiff's property was damaged by the increased run-off. No such evidence was presented as to the other defendants.

2. Negligence— professional—prima facie—evidence not sufficient

Plaintiff's forecast of evidence failed to establish any of the essential elements of prima facie professional negligence by defendant engineer in a case which arose from increased run-off from developing a subdivision.

Appeal by plaintiff from orders entered 20 August 2004 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 16 June 2005.

Michael Levine, for plaintiff.

Bailey & Dixon, L.L.P., by David S. Coats and David S. Wisz, for defendant St. Lawrence Homes, Inc.

George B. Currin, for defendant Braxton Development Company.

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Maupin Taylor, P.A., by John I. Mabe and Matthew F. Fussa, for defendants M.T. Murphy Construction Co., Inc. and Penny Sekadlo, d/b/a Penny Engineering Design.

HUDSON, Judge.

On 31 October 2003, plaintiff Deborah Rainey filed a complaint alleging: trespass to land and nuisance against defendants St. Lawrence Homes, Inc. ("St. Lawrence"), Braxton Development Group ("Braxton"), and M.T. Murphy Construction Co., Inc., ("Murphy"); and negligent design against Penny Sekadlo, d/b/a Penny Engineering Design ("Penny"). Defendants answered and later each moved for summary judgment. On 20 August 2004, the court dismissed plaintiff's claims and granted summary judgment to each defendant in separate orders. Plaintiff appeals. As discussed below, we affirm in part and reverse in part.

This appeal arises from a dispute over liability for damages to plaintiff's real property from surface water run-off. Beginning in 2000, property adjacent to plaintiff's was developed as the Grayson Subdivision ("Grayson"). Plaintiff's property backs up to and lies downhill from Aptos Court in Grayson. Since development of Grayson, plaintiff's property has suffered erosion, flooding and other damage caused by surface water run-off. In November 2001 and October 2002, defendant Braxton transferred ownership of parts of the property comprising Grayson to defendant St. Lawrence, which then obtained building permits for various lots. Defendant Murphy performed the grading at Grayson, while defendant Penny prepared the original plan.

[1] Plaintiff argues that the court erred in granting summary judgment to St. Lawrence, Braxton and Murphy on her nuisance claims. We agree with respect to St. Lawrence, but disagree with respect to defendants Braxton and Murphy.

The standard of review on appeal from summary judgment is:

'whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.' *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982); N.C. Gen.

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Stat. § 1A-1, Rule 56(c) (2003). If the moving party satisfies its burden, the burden shifts to the non-movant to set forth specific facts showing there exists a triable issue of fact. *Lowe*, 305 N.C. at 369-70, 289 S.E.2d at 366.

McGuire v. Draughon, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005).

In 1977, our Supreme Court adopted the rule of reasonable use with respect to surface water drainage:

Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but *liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage.*

Analytically, a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action, with *liability arising where the conduct of the landowner making the alterations in the flow of surface water is either (1) intentional and unreasonable or (2) negligent, reckless or in the course of an abnormally dangerous activity.*

Pendergrast v. Aiken, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977) (internal citations and quotation marks omitted) (emphasis supplied). “Most nuisances of this kind are intentional, usually in the sense that ‘the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff’s interests is substantially certain to follow.’” *Id.* at 217, at 797 (quoting W. Prosser, *Law of Torts* § 87 (4th Ed. 1971)). Thus, the essential inquiry in any nuisance action is whether the defendant’s action was unreasonable. *Id.*

Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant

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involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence.

Id. (internal citations omitted). Even when the change in the water flow caused by the defendant is reasonable in the sense that the social utility arising from the change outweighs the harm to a plaintiff, a defendant may still be liable for nuisance damages. *Id.* at 217-18, 236 S.E.2d at 797. "The gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of the defendant." *Id.* at 218, 236 S.E.2d at 797.

At his deposition, Francis X. Buser, plaintiff's engineering expert on surface water run-off, testified that the actions of St. Lawrence in developing Grayson contributed to the unreasonable increase in the volume of water flowing onto and damaging plaintiff's property. Because reasonableness is a question of fact to be determined in each case and because reasonableness with regard to the impact of St. Lawrence's actions is disputed, summary judgment for St. Lawrence was improper, and we reverse that portion of the trial court's order. Buser's testimony does not, however, contain any opinion or suggestion that the actions of Braxton or Murphy have contributed to the unreasonable increase in surface water run-off on plaintiff's property, and we affirm summary judgment on the nuisance claims as to those defendants.

Plaintiff next argues that the court erred in granting summary judgment to defendants St. Lawrence, Braxton and Murphy on her claims of trespass to land. We agree that the court erred in granting summary judgment to St. Lawrence, but conclude there was no error with regard to defendants Murphy and Braxton.

"The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession." *Jordan v. Foust Oil Co.*, 116 N.C. App. 155, 166, 447 S.E.2d 491, 498 (1994). Further, in the absence of negligence, trespass to land requires that a defendant intentionally enter onto the plaintiff's land. *York Industrial Center, Inc. v. Michigan Mut. Liability Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 505-06, (1967). However, though the

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defendant's entry must be intentional, the defendant need not have contemplated any damage to the plaintiff to incur liability. *Lee v. Stewart*, 218 N.C. 287, 289, 10 S.E.2d 804, 805 (1940).

Here, plaintiff's forecast of evidence, particularly in Buser's deposition testimony, indicates that she owned property that was damaged by an increase in surface water run-off resulting at least in part from St. Lawrence's development of Grayson. While St. Lawrence may not have contemplated or intended the damage to plaintiff's property, St. Lawrence did intend to develop Grayson which action Buser testified was likely a cause of the increased surface water run-off onto plaintiff's property. Thus, the court erred in granting summary judgment to St. Lawrence. However, plaintiff failed to forecast like evidence with regard to Murphy and Braxton, and the court properly granted their motions and dismissed the trespass to land charges against them.

[2] Plaintiff also argues that the court erred in granting summary judgment to defendant Penny on the issue of negligence. We disagree.

To establish a *prima facie* case of professional negligence a plaintiff must show "(1) the nature of [defendant]'s profession; (2) [defendant]'s duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to [plaintiff]." *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 10, 607 S.E.2d 25, 31 (2005). Plaintiff's forecast of evidence, including the report and deposition from Buser, fails to establish any of the essential elements of a *prima facie* case of negligence. Thus, we conclude that summary judgment was proper on the negligence claim against Penny.

Affirmed in part, reversed in part.

Judges STEELMAN and JACKSON concur.

FALKSON v. CLAYTON LAND CORP.

[174 N.C. App. 616 (2005)]

FRANK H. R. FALKSON, KENNETH COLLIER, FRANCIS CARTER, ALBERT G. FOLCHER, III, VICTOR VANCE, BURT MOODY, AND WATERWAY LANDING—POCOSIN FARMS PROPERTY OWNERS ASSOCIATION, PLAINTIFFS v. CLAYTON LAND CORPORATION, 3-B FARMS, INC., AND JIMMY D. BRINN, JR., AND WIFE, PAULA O. BRINN, DEFENDANTS

No. COA04-1596

(Filed 15 November 2005)

Easements— servient tenant’s impermissible interference with dominant tenant’s use— motion to dismiss

The trial court erred by granting defendants’ Rule 12(b)(6) motion to dismiss plaintiffs’ complaint seeking relief for damages allegedly done to an easement by defendants’ use and plaintiffs’ loss of use resulting from such damage, because such relief is available in North Carolina in situations where a servient tenant impermissibly interferes with a dominant tenant’s use of an easement.

Appeal by plaintiffs from an order entered 12 July 2004 by Judge William C. Griffin, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 16 June 2005.

Geo. Thomas Davis, Jr., for the plaintiffs-appellants.

Keith B. Mason and McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Terri W. Sharp, for Clayton Land Corporation and Jimmy D. Brinn, Jr. and wife, Paula O. Brinn, defendants-appellees.

Franklin B. Johnston, for 3-B Farms, Inc., defendants-appellees.

JACKSON, Judge.

The facts giving rise to this appeal are undisputed. Plaintiffs and defendants, through a series of conveyances, are the owners, or representatives of the owners, of parcels of property which originally comprised a single piece of property owned by the Rich family. The properties owned by plaintiffs and the properties of the owners represented by the Waterway Landing-Pocosin Farms Property Owners Association (“Homeowner’s Association”) originally were transferred as a single parcel from the Rich family. That parcel subsequently was subdivided into two subdivisions. The original deed to the property

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which now comprises the two subdivisions included an easement for ingress and egress which the parties agree describes Airport Road, the subject of the instant controversy. The Homeowner's Association was formed to maintain Airport Road as well as other roads and common areas within the two subdivisions.

Title to defendants' properties also originated from the Rich family and the properties, collectively, are the servient estate of the easement. Defendants' properties lay between plaintiffs' properties and the public roadway and are utilized as farmland.

Airport Road, which constitutes the easement, is a dirt road constructed by the Riches prior to any land sales to the parties to this case. The road was constructed by digging canals which were then filled with wood and topped off with dirt. Due to the manner of construction, the road is subject to developing holes where the underlying wood has rotted away. These holes normally are repaired by filling them with dirt. After the original transfer of the property constituting the dominant estate from the Riches to plaintiffs' grantor, plaintiffs' grantor improved the entire length of the road surface by placing rock on top of the dirt surface.

The Homeowner's Association subsequently placed rock in holes that developed in the road and sought compensation from defendants for that portion of the cost that it considered reasonably attributable to the portion of the road owned and used by defendants. Defendants refused to pay the compensation requested, contending that they had no duty to maintain the easement and that their use of it was reasonable and within the uses provided for by the language granting the easement. Plaintiffs contend that defendants' use of the easement caused substantial damage thereto and deprived them of their reasonable use of the easement, thus requiring compensation from defendants.

Plaintiffs filed a complaint in the Superior Court of Hyde County on 14 March 2001 seeking declaratory and monetary relief. Defendants filed answers and motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs then filed a motion for partial summary judgment. On 7 June 2004, a hearing was held on the parties' motions. At the hearing, oral testimony was presented by the president of defendant, 3-B Farms, Inc., who testified generally regarding the defendants' use of the road.

After hearing the testimony and arguments of counsel, the trial court denied plaintiffs' motion for partial summary judgment and

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granted defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs timely appealed the order granting the motion to dismiss.

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. *Country Club of Johnston County, Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). In the case *sub judice*, the allegations relevant to this appeal are that defendants had caused substantial damage to the roadway over which plaintiffs had an easement and that such damage substantially deprived plaintiffs of the reasonable use of that easement.

Both parties agree that the general rule in North Carolina is that the owner of a servient estate has no duty to maintain or repair an easement for the benefit of the dominant tenant in the absence of an agreement requiring it. *Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982); *see also*, *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 165, 418 S.E.2d 841, 848 (1992); 25 Am. Jr. 2d Easements and Licenses in Real Property § 94 (2004). Both parties also agree, that the owner of a servient estate may continue to make reasonable use of the property which is subject to the easement. *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 687-88, 51 S.E.2d 191, 195 (1949). A servient owner may not, however, make use of the property in such a way as to interfere with the dominant tenant's reasonable use of the easement for the purpose for which it was granted and any such use may be enjoined. *Id.* WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA provides that, with respect to this rule:

"Any activity by the fee owner which would result in increased cost or inconvenience to the easement holder in exercise of his rights or which would create a safety hazard should those rights be exercised amounts to a material impairment of the easement interest."

PATRICK K. HETRICK & JAMES B. McLAUGHLIN, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 15-23 (5th ed. 1999) (quoting *United States v. Sea Gate, Inc.*, 397 F. Supp. 1351, 1358 (D.N.C. 1975)).

Plaintiffs' complaint plainly alleges that defendants have caused substantial damage to the roadway which is subject to the easement

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[174 N.C. App. 619 (2005)]

and that such damage has substantially deprived them of the reasonable use of the easement. Plaintiffs seek damages from defendants resulting from the damage allegedly done to the easement by defendants' use and plaintiffs' loss of use resulting from such damage. Such relief is available in North Carolina in situations where a servient tenant impermissibly interferes with a dominant tenant's use of an easement. *See Williams v. Skinner*, 93 N.C. App. 665, 673, 379 S.E.2d 59, 64-65, *cert. denied*, 325 N.C. 277, 384 S.E.2d 532 (1989) ("It is a correct proposition that the holder of an easement may seek monetary damages for wrongful interference with his use of the easement."). Accordingly, we hold that plaintiffs' complaint did state a claim for which relief could be granted and, therefore, reverse the trial court's order granting defendants' Rule 12(b)(6) motion.

Reversed.

Judges HUDSON and STEELMAN concur.

CYNTHIA GAIL MILLER AND GUY MORRIS MILLER, PLAINTIFFS v. FORSYTH MEMORIAL HOSPITAL, INC. D/B/A "PIEDMONT MEDICAL SPECIALISTS";
PIEDMONT MEDICAL SPECIALISTS, P.L.L.C.; NOVANT HEALTH, INC.; AND
NOVANT HEALTH TRIAD REGION, L.L.C., DEFENDANTS

No. COA04-1179-2

(Filed 15 November 2005)

Appeal and Error— preservation of issues—denied discovery

The Court of Appeals will not order a new trial on conjecture and speculation. The plaintiffs in this case did not demonstrate prejudice from the denied discovery of medical peer review material where they neither attempted to introduce evidence about the peer review process at trial nor requested an in camera review of the documents.

Appeal by plaintiffs from judgment entered 6 October 2003 and cross-appeal by defendants from judgment entered 31 October 2003 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 12 May 2005. Petition for rehearing granted on 31 October 2005.

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[174 N.C. App. 619 (2005)]

Elliot Pishko Morgan, P.A., by David C. Pishko, for plaintiff-appellant.

Wilson & Iseman, L.L.P., by Tamura D. Coffey, Linda L. Helms, Kevin B. Cartledge and Maria C. Papoulias, for defendant-appellees.

Glenn, Mills & Fisher, P.A., by William S. Mills for the North Carolina Academy of Trial Lawyers; and Roberts & Stevens, P.A., by Peter Buckley McGuire for the North Carolina Association of Defense Attorneys, amicus curiae.

STEELMAN, Judge.

This matter was previously heard by this Court on 12 May 2005, and a decision was rendered in *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838 (2005). Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, this Court granted plaintiffs Cynthia and Guy Miller's petition for rehearing. This Court granted the petition to rehear on the limited issue of whether the trial court erred in denying plaintiffs' motion to compel discovery and granting defendants' motion for protective order.

The facts in this matter are set forth in this Court's previous opinion, *Miller*, 173 N.C. App. 385, 618 S.E.2d 838. Plaintiffs contend this Court failed to address or misapprehended an issue raised on appeal. Specifically, plaintiffs contend we failed to address whether the trial court erred in denying plaintiffs' motion to compel discovery and granting defendants' motion for protective order on the grounds that the information and documents plaintiffs sought were discoverable and not protected by the peer review privilege or the medical review committee privilege. We adopt our previous opinion in this matter in full and supplement it with the resolution of this issue.

"It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Windman v. Britthaven, Inc.*, 173 N.C. App. 630, 632, 619 S.E.2d 522, 524 (2005) (citations and internal quotation marks omitted). In addition, the appellant must show not only that the trial court erred, but that prejudice resulted from that error. *See Bowers v. Olf*, 122 N.C. App. 421, 427, 470 S.E.2d 346, 350 (1996). This Court will not presume prejudice.

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The record in this case contains a "Privilege Log," which briefly describes each of the documents defendants contend were subject to the peer review privilege. The record also contains several affidavits briefly describing the contents of some of these documents. However, nothing in the log or the affidavits indicate what, if any, information these documents contained that would have been beneficial to plaintiffs' case to the extent necessary to show plaintiffs' were prejudiced as a result of the trial court's denial of their motion to compel.

This situation is analogous to that occurring at trial where a party must proffer evidence or testimony that has been deemed inadmissible in order to preserve an issue for appeal. Our Supreme Court has stated that for a party to preserve the issue of the exclusion of evidence or testimony for appellate review, its importance must be made to appear in the record and a specific offer of proof is required, unless the significance of the evidence is discernable from the record. *In re Dennis v. Duke Power Co.*, 341 N.C. 91, 102, 459 S.E.2d 707, 714 (1995). When a party objects to the exclusion of evidence or testimony, but does not make an offer of proof for the record of what that testimony or evidence would be, we cannot assess the importance of the evidence sought to be admitted or elicited. *Id.* Therefore, failure to make an offer of proof prevents a determination of prejudice. *Id.*

The significance of the documents in question is not obvious from the record in this matter. Plaintiffs assert that in the face of the trial court's ruling denying their motion to compel discovery there was no way for them to preserve this evidence for appellate review. Plaintiffs' are incorrect for two reasons. First, as noted in our original opinion, plaintiffs made no attempt at the trial of this case to introduce any evidence regarding defendants' peer review process or the internal investigation that occurred following the injection. *Miller*, 173 N.C. App. at 388, 618 S.E.2d at 841. Second, plaintiffs could have requested that the trial court review the documents *in camera* and then seal the documents for possible appellate review. *In camera* review allows the trial court to direct that the requested information be produced under seal for determination by it of relevancy or potential for leading to discovery of admissible evidence. *Shaw v. Cameron*, 125 N.C. App. 522, 529, 481 S.E.2d 365, 369 (1997). Any material which the court determines not to be discoverable may then be preserved under seal for review on appeal should further consideration by this Court become necessary. *Id.* See also *State v. Phillips*, 328 N.C. 1, 18, 399 S.E.2d 293, 301 (1991); *Maxwell v. Michael P.*

IN RE L.C. & A.N.

[174 N.C. App. 622 (2005)]

Doyle, Inc., 164 N.C. App. 319, 329, 595 S.E.2d 759, 765 (2004) (appellate court able to review records defendant sought through discovery after trial court held *in camera* review and then sealed the records for appellate review); *In re Greene*, 152 N.C. App. 410, 420, 568 S.E.2d 634, 640 (2002).

Without the relevant documents, we cannot determine that plaintiffs have been prejudiced as a result of the trial court's ruling. Plaintiffs are asking this Court to speculate about the information the documents might have contained simply because defendants resisted discovery; in essence they ask us to presume prejudice. This Court will not order a new trial based upon conjecture and speculation. It was plaintiffs' duty to properly preserve this question for appellate review. Because plaintiffs' failed to demonstrate prejudice, it is unnecessary for this Court to address the merits of the peer review privilege issue.

NO ERROR AS TO TRIAL.

AS PER PREVIOUS OPINION, AFFIRMED IN PART AND REVERSED AND REMANDED IN PART AS TO COSTS ORDERED.

Judge TIMMONS-GOODSON concurs prior to October 31, 2005.

Judge McCULLOUGH concurs.

IN THE MATTER OF: L.C. AND A.N.

No. COA05-363

(Filed 15 November 2005)

Civil Procedure— Rule 60—not a substitute for appellate review

The trial court did not abuse its discretion by dismissing a Rule 60 motion to vacate a termination of parental rights after an unsuccessful appeal.

Appeal by respondent from an order entered 18 October 2004 by Judge Avril U. Sisk in Mecklenburg County District Court. Heard in the Court of Appeals 12 October 2005.

IN RE L.C. & A.N.

[174 N.C. App. 622 (2005)]

Alexandra S. Gruber, Appellate Coordinator, for North Carolina Guardian ad Litem petitioner-appellee.

Alan B. Edmonds, Associate County Attorney, for Mecklenburg County petitioner-appellee.

Ellis M. Bragg for respondent-appellant.

BRYANT, Judge.

N.N.H.¹ (respondent-mother) appeals from an order entered 18 October 2004 which dismissed a motion to vacate the termination of her parental rights. Respondent's motion was filed pursuant to N.C. R. Civ. P. § 1A-1, Rule 60 and N.C. Gen. Stat. § 7B-1113.

On 1 June 2004, this Court filed *In re L.C.*, 164 N.C. App. 598, 596 S.E.2d 473 (2004) (unpublished) (hereinafter *In re L.C. I*) which affirmed the trial court's termination of respondent's parental rights. Since the filing of *In re L.C. I*, adoption petitions filed on 11 October 2004 are currently stayed pending the outcome of this appeal. L.C. and A.N. have been, and continue to remain, in the custody of DSS since December 2000.

A trial court's determination of a Rule 60(b) motion is reviewable only for abuse of discretion. *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002) (citations omitted) *appeal dismissed and review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003). Abuse of discretion is shown only when "the challenged actions are manifestly unsupported by reason." *Id.* The trial court's findings supported by competent evidence are conclusive on appeal. *Id.* Rule 60(b)(6) permits the trial court to set aside a judgment or order "for any reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). Setting aside a judgment pursuant to Rule 60 requires the movant to show: "(i) extraordinary circumstances exist and (ii) there is a showing that justice demands it . . . [and that she] has a meritorious defense." *Royal v. Hartle*, 145 N.C. App. 181, 184-85, 551 S.E.2d 168, 171 (2001) (quoting *State ex rel. Env't'l Mgmt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117 (1991), *reversed on other grounds*, 338 N.C. 262, 449 S.E.2d 453 (1994)). However Rule 60 cannot be used as a substitute for appellate review. *O'Neill v. Southern Nat'l Bank*, 40 N.C. App. 227, 237, 252 S.E.2d 231, 234 (1979); *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974).

1. Initials are used to protect the identity of the juveniles.

IN RE L.C. & A.N.

[174 N.C. App. 622 (2005)]

In the present appeal (*In re L.C. II*), respondent argues she is seeking post-appellate relief of the trial court's dismissal of her Rule 60 motion. On review of respondent's Rule 60 motion, the trial court found and concluded:

2. Rule 60 is not appropriate for this situation. Rule 60 grants relief from trial court judgements [sic], not from appellate court decisions.
3. Case law states a Rule 60 motion is not to be used as a substitute for appellate relief. In this case, [respondent] sought appellate relief [in *In re L.C. I*], but was not successful. She cannot then use a Rule 60 Motion to circumvent the adverse decision by the North Carolina Court of Appeals.

. . .

5. [T]he [c]ourt dismisses [respondent's] motion[.]

Based on the foregoing we affirm the trial court's order dismissing respondent's Rule 60 motion. *See Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 450 S.E.2d 554 (1994) (trial court's order denying defendant's motion was affirmed where Rule 60 motion used as a substitute for appellate review).

Affirmed.

Judges HUDSON and CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 NOVEMBER 2005

ADAMS v. WIGGINS No. 05-99	Mecklenburg (99CVD18621)	Affirmed in part, vacated in part and remanded for entry of a corrected order
CAMPBELL v. BOWMAN No. 05-16	Guilford (03CVS8234)	Affirmed
CARPENTER v. RATLIFF No. 05-271	Anson (03CVD568)	Affirmed
EMILY'S COOKIE MIX, INC. v. CORA LTD. P'SHIP No. 04-1630	Alamance (03CVS1835)	Affirmed
In re I.H. No. 04-932	Harnett (02J216)	Affirmed
IN RE A.C.J. & P.A.G.S. No. 05-159	Durham (04TPR6) (04TPR7)	Vacated and remanded
IN RE A.L. a/k/a A.H. & L.L. a/k/a L.H. No. 05-180	Transylvania (01J46) (01J47)	Reversed and remanded
IN RE B.R.H. No. 05-374	Mecklenburg (02J849)	Affirmed
IN RE J.M. & D.M. & K.M. No. 05-106	Guilford (03J297) (03J298) (03J299)	Affirmed
MANESS v. WESTFALIA- SURGE, INC. No. 05-400	Iredell (04CVS810)	Affirmed
MECKLENBURG CTY. v. ROZUMNY DEV., LLC No. 04-1718	Mecklenburg (02CVS14113) (02CVS16417)	Affirmed
PAKE v. FRY No. 05-325	Carteret (04CVS101)	Reversed
PROCTOR v. MCGINNIS No. 04-1562	Wake (03CVS6450)	No error
RIDGE v. FAULKNER No. 05-177	Guilford (03CVS10989)	Appeal dismissed
ROBERTS v. MILLS MFG. CORP. No. 04-1529	Ind. Comm. (I.C. #936103)	Affirmed

SANDERS v. BRAD FARRAH PONTIAC GMC NISSAN No. 05-77	Ind. Comm. (I.C. #063225)	Affirmed in part and remanded
SPANO v. MAIL CONTR'RS OF AM. No. 04-1719	Ind. Comm. (I.C. #186543)	Reversed
STATE v. ARIAS No. 05-460	Henderson (02CRS4482) (02CRS4483)	Affirmed
STATE v. BLACK No. 04-1699	Forsyth (97CRS15079)	Affirmed
STATE v. BREEDLOVE No. 04-1251	Davidson (03CRS3861) (03CRS50411)	No error
STATE v. CALDWELL No. 05-139	Mecklenburg (02CRS235273) (02CRS235274) (02CRS235275) (02CRS235281) (02CRS235282) (02CRS235283) (02CRS235284) (02CRS235288) (02CRS235289) (02CRS235290)	No error
STATE v. CALHOUN No. 04-1680	Wake (02CRS34228)	New trial
STATE v. CELAYA No. 05-95	Forsyth (02CRS63584) (02CRS63585) (03CRS6168)	Affirmed
STATE v. CLAY No. 05-568	New Hanover (04CRS56552)	No error
STATE v. COPPOLA No. 04-1511	Wake (03CRS3701)	No error
STATE v. DERBECK No. 05-59	Mecklenburg (02CRS214614) (02CRS214616) (02CRS214981)	No error
STATE v. DUARTE No. 04-1455	Henderson (03CRS52615)	Affirmed in part and remanded for resentencing
STATE v. FLOWERS No. 05-278	Columbus (03CRS6687)	No error

STATE v. FOWLER No. 05-435	Wake (03CRS51209)	No error
STATE v. GETER No. 05-242	Catawba (04CRS50659) (04CRS50660)	No error
STATE v. HANKINS No. 04-1079	Brunswick (02CRS57572) (02CRS57573) (02CRS57574) (02CRS57575) (02CRS57580) (02CRS57576) (02CRS57586) (02CRS57587) (02CRS57594) (02CRS57595) (03CRS630) (03CRS4606) (03CRS3616) (03CRS3617)	New Trial
STATE v. HARRIS No. 04-1064	Forsyth (02CRS10092) (02CRS51618)	No error
STATE v. HELMS No. 05-19	Gaston (02CRS70067) (02CRS70068) (02CRS70069) (02CRS70093) (02CRS70063)	No error
STATE v. HIGH No. 05-58	Gaston (02CRS6513) (02CRS6524)	No error
STATE v. JACOBS No. 04-1499	Bladen (03CRS1867) (03CRS1869)	No error
STATE v. JAMES No. 05-599	McDowell (04CRS51249)	Dismissed
STATE v. JONES No. 04-1185	Buncombe (00CRS1097) (00CRS51649)	Affirmed
STATE v. LANCASTER No. 05-250	Craven (03CRS55070) (04CRS2853)	No error

STATE v. LEAK No. 05-393	Forsyth (04CRS51914)	No error in part; vacated in part, and remanded for resentencing
STATE v. LUNSFORD No. 05-804	Caldwell (04CRS5020) (04CRS5021) (04CRS5022)	Affirm judgments in case numbers 04CRS5020 and 04CRS5021; Remand for corrections judg- ment in case number 04CRS5022
STATE v. MARTIN No. 05-366	Watauga (02CRS3079)	Dismissed
STATE v. McDUFFIE No. 04-1085	Randolph (01CRS56974) (01CRS57000) (01CRS57012)	No error
STATE v. MONTGOMERY No. 04-1611	Mecklenburg (03CRS240347) (03CRS240348)	No error
STATE v. PARKER No. 04-1306	Halifax (03CRS58290) (03CRS4685)	No error
STATE v. PENNY No. 04-1401	New Hanover (01CRS28582)	No error
STATE v. ROBINSON No. 04-983	Catawba (03CRS54817)	No error
STATE v. SCOTT No. 05-179	Catawba (03CRS15242) (03CRS15243)	No error
STATE v. SUITT No. 04-1701	Forsyth (01CRS52541)	Affirmed
STATE v. SWANSON No. 04-1350	Craven (92CRS4438) (92CRS4439)	No error
STATE v. THOMAS No. 05-480	Forsyth (04CRS52708)	No error
STATE v. TRIPLETT No. 04-1552	Wilkes (02CRS54890)	No error at trial. Remanded for resentencing
STATE v. TURNER No. 04-1240	Forsyth (03CRS52880) (03CRS24761)	No error

STATE v. WEAVER No. 04-1277	Gaston (03CRS63869) (03CRS63870)	No error
STATE v. WILLIAMS No. 04-824	Cabarrus (02CRS7367) (02CRS10596)	No error
STATE v. WILLIAMS No. 04-1506	Wake (02CRS88230) (02CRS88233)	No error
STATE v. WRIGHT No. 05-327	Forsyth (03CRS52528)	No error
STATE v. YOKLEY No. 04-1483	Davidson (03CRS3881) (03CRS52172) (03CRS52173)	No error
SURBER v. ROCKINGHAM CTY. BD. OF EDUC. No. 05-170	Ind. Comm. (I.C. #310814)	Appeal dismissed
VETERE v. LEPANTO No. 05-91	Buncombe (01CVD4759)	Appeal dismissed

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STATE OF NORTH CAROLINA EX REL. ROY COOPER, ATTORNEY GENERAL, AND JOSEPH A. SMITH, JR., COMMISSIONER OF BANKS, PLAINTIFF V. NCCS LOANS, INC.; JAGJRTX, LLC; JAG NC, LLC D/B/A "ADVANCE INTERNET" AND "ADVANCE TIL PAYDAY," AND JOHN A. GILL, DEFENDANTS

No. COA04-1660

(Filed 6 December 2005)

1. Interest—loans—usury—Consumer Finance Act

The trial court did not err by entering summary judgment for plaintiffs on the issues of whether defendants violated the Consumer Finance Act and made usurious loans when Advance Internet customers were required to repay both a cash advance that was purportedly a "rebate" on an internet services contract and an additional fee of at least 20% of the amount of cash received where the internet access that was the ostensible subject of the contract had little or no monetary value, because: (1) the undisputed evidence of defendants' advertising and business practices supported the trial court's finding that defendants' sale of internet service is merely a guise for its operation as a small loan business; (2) defendants charge 100 times more per hour than legitimate internet service providers for very limited internet access a few hours a week available only on defendants' office computers and only by appointment during defendants' business hours, and North Carolina public libraries offer free access to the internet; (3) the substance of the product is the cash rebate, and the cash rebates are not related or associated with any payment for something of real value; (4) the fair market value of Advance Internet contracts is negligible or zero, and the evidence suggested no rational reason to contract with defendant except to get immediate cash; (5) the dollar amount of the periodic payments, when calculated as interest, revealed that the annual rate of interest on these loans was greatly in excess of the maximum permitted under North Carolina law; (6) the uncontradicted material facts provided no basis for a reasonable factfinder to conclude the Advance Internet contracts were anything other than short-term loans; (7) plaintiff is not required to show that in each and every transaction defendants and the customer had the specific corrupt intent to enter into a usurious loan agreement; and (8) the fact that some customers may have used defendants' computers to access the internet does not change the reality that such use was incident to the central purpose of obtaining a cash loan.

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2. Unfair Trade Practices— violation of North Carolina's Consumer Finance Act—usurious loans

The trial court did not err by entering summary judgment for plaintiffs on the issue of whether defendants engaged in unfair or deceptive trade practices when Advance Internet customers were required to repay both a cash advance that was purportedly a “rebate” on an internet services contract and an additional fee of at least 20% of the amount of cash received while the internet access that was the ostensible subject of the contract had little or no monetary value, because: (1) proof of actual deception is not necessary, but instead it is enough that the statements had the capacity to deceive; (2) defendants did not inform consumers that they were executing documents in violation of North Carolina's Consumer Finance Act, and based on all the facts defendants' contracts had the capacity to deceive; and (3) it is a paramount public policy of North Carolina to protect its resident borrowers through the application of North Carolina interest laws, and defendants' practice of offering usurious loans was a clear violation of this policy.

3. Contracts— loans—charging higher interest rate—cancellation

The trial court did not err by decreeing that Advance Internet rebate contracts with North Carolina consumers were cancelled pursuant to N.C.G.S. § 75-15.11 and by requiring all funds collected by defendants pursuant to such contracts be refunded to consumers, because: (1) the trial court's order is authorized by N.C.G.S. § 53-166(d) and N.C.G.S. § 24-2; (2) having already concluded that the trial court did not err by granting summary judgment for plaintiffs, this issue has necessarily been resolved against defendants; and (3) although defendants contend the court was required to apportion defendants' refund of funds collected by defendants pursuant to the contracts, defendants failed to offer any argument or authority to support this position as required by N.C. R. App. P. 28(b)(6).

4. Pleadings— motion to amend—additional party

The trial court did not abuse its discretion by allowing plaintiff's motion to amend the complaint to add John Gill as a defendant and by entering summary judgment against him individually, because: (1) defendants failed to appeal the order allowing Gill's addition as a defendant; (2) defendants cite no authority for the proposition that N.C.G.S. § 1-278 requires the Court of Appeals to

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review an interlocutory order; (3) regardless of whether N.C.G.S. § 57C-3-30(b) restricts the circumstances in which a member of a limited liability company may be added as a party to a lawsuit, N.C.G.S. § 57C-3-30(a) anticipates that a member who is also a manager, director, executive, or any combination thereof might be made a defendant and become personally liable by reason of his own acts or conduct; and (4) defendant had the right to offer evidence opposing summary judgment, notwithstanding his failure to file an answer, but defendant offered no evidence contradicting plaintiff's assertion that he directed and controlled the illegal activities of corporate defendants.

Appeal by defendants from judgment entered 9 September 2004 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 13 September 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General L. McNeil Chestnut, Assistant Attorney General Philip A. Lehman, and Assistant Attorney General M. Lynne Weaver, for the State.

Ellis and Winters LLP, by Matthew W. Sawchak, Thomas D. Blue, Jr., and George F. Sanderson, III, for defendants-appellants.

LEVINSON, Judge.

Defendants (NCCS Loans, Inc.; JAGJRTX, LLC; JAG N.C., LLC, d/b/a "Advance Internet" and "Advance Til Payday"; and John Gill), appeal from summary judgment entered in favor of plaintiff (State of North Carolina). We affirm.

[1] "The question before us, which appears to be one of first impression, requires us to determine whether a company's policy of extending to its customers an immediate cash 'rebate,' as well as [use of its office computers for a few hours a week, by appointment, to access the internet], in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, is tantamount to the operation of a small loan business in violation of [North Carolina's] usury laws." *Short on Cash.net v. Dep't of Finan.*, 811 N.E.2d 819, 824 (Ind. Ct. App. 2004). The Defendant NCCS Loans is a corporation which until 31 August 2001 did business in North Carolina through its "Advance Til Payday" check-cashing stores, where it offered deferred deposit loans. On

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1 September 2001 defendant closed Advance Til Payday, and reopened its stores under the name "Advance Internet." Corporate defendant JAGJRTX, LLC succeeded NCCS as owner of Advance Internet. On 12 February 2002 plaintiff filed suit against defendants NCCS Loans, Inc., and JAGJRTX, LLC, d/b/a "Advance Internet" and "Advance Til Payday." Plaintiff sought injunctive and other relief for (1) usury, in violation of N.C. Gen. Stat. § Chapter 24; (2) violation of the North Carolina Consumer Finance Act, N.C. Gen. Stat. § 53-166; and (3) unfair and deceptive trade practices, in violation of N.C. Gen. Stat. § 75-1.1. In March 2003 plaintiff moved to amend its complaint to add two additional defendants, JAG N.C., LLC d/b/a "Advance Internet" and "Advance Til Payday"; and John Gill. Defendants consented to the addition of JAG N.C., LLC. Gill was added by court order entered in June 2003. Plaintiff also filed a motion for summary judgment, which was heard by the trial court in June 2004. On 9 September 2004 the court entered an order granting summary judgment in favor of plaintiff on all claims. Defendants have appealed the summary judgment order. "Summary judgment is an appropriate disposition only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 578-79, 573 S.E.2d 118, 123 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001)). Defendants herein argue that the trial court erred by granting summary judgment for plaintiff, on the grounds that the evidence raised genuine issues of material fact as to whether they violated the Consumer Finance Act, made usurious loans, or engaged in unfair or deceptive trade practices. We disagree.

"Interest is the premium allowed by law for the use of money, while usury is the taking of more for its use than the law allows. It is an illegal profit." *Yarborough v. Hughes*, 139 N.C. 199, 207, 51 S.E. 904, 907 (1905). "The elements of usury are [1] a loan or forbearance of the collection of money, [2] an understanding that the money owed will be paid, [3] payment or an agreement to pay interest at a rate greater than allowed by law, and [4] the lender's corrupt intent to receive more in interest than the legal rate permits for use of the money loaned." *Swindell v. National Mortgage Ass'n*, 330 N.C. 153, 159, 409 S.E.2d 892, 895-96 (1991) (citations omitted). "Usury statutes are designed to protect the borrower whose necessity and importunity may place him at a disadvantage with respect to the exactions of the lender[.]" *Mortgage Co. v. Zion Church*, 219 N.C. 395, 397, 14

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S.E.2d 37, 38 (1941) (quoting *Hill v. Lindsay*, 210 N.C. 694, 699, 188 S.E. 406, 409 (1936)).

Regulation of consumer loans is addressed in Chapter 24 of the General Statutes, N.C. Gen. Stat. § 24-1.1, and the North Carolina Consumer Finance Act, N.C. Gen. Stat. § 53-164, *et seq.* (2003). The maximum allowable rate of interest on consumer loans of \$25,000 or less is set forth in N.C. Gen. Stat. § 24-1.1(c). Under the Consumer Finance Act, a consumer lender may not charge interest “greater than permitted by Chapter 24” on loans of \$10,000 or less without first obtaining a license from the North Carolina Commissioner of Banks. N.C. Gen. Stat. §§ 53-166 and 53-168 (2003). In sum, for an unlicensed lender to charge a rate of interest on a small loan greater than the rates permitted is a violation both of the Consumer Finance Act, and of Chapter 24’s prohibitions on usury. In the instant case, it is undisputed that defendants are not licensed by the Commissioner of Banks.

However, usury laws apply only to loans, not to sales. *Auto Supply v. Vick*, 303 N.C. 30, 47-48, 277 S.E.2d 360, 372 (1981) (“If there is a bona fide purchase of property as opposed to a subterfuge to conceal a loan at a usurious rate, then the usury laws have no application whatsoever, even though the sale is made at an exorbitant price.”). A loan is “made upon ‘the delivery by one party and the receipt by the other party of a given sum of money, an agreement, express or implied, to repay the sum lent, with or without interest.’” *Kessing v. Mortgage Corp.*, 278 N.C. 523, 529, 180 S.E.2d 823, 827 (1971) (quoting 54 C.J.S. LOANS, p. 654) (other citations omitted). Significantly, N.C. Gen. Stat. § 53-166(b) (2003) expressly states that its provisions “apply to any person who seeks to avoid its application by any device, subterfuge or pretense whatsoever.” Thus:

The courts of this state regard the substance of a transaction, rather than its outward appearance, as controlling. Specifically, when there is an allegation that the usury laws have been violated by a particular act or course of conduct, the courts of North Carolina will not hesitate to look beneath the formality of the activity to determine whether such an incident is, in fact, usurious.

Auto Supply, 303 N.C. at 37, 277 S.E.2d at 366 (citing *Ripple v. Mortgage Corp.*, 193 N.C. 422, 137 S.E. 156 (1927)) (other citations omitted).

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Defendants previously offered deferred deposit loans, commonly known as “payday loans”, through their “Advance Til Payday” check-cashing stores in North Carolina. To obtain such a loan, the customer would write a check payable to the payday lender after providing proof of employment and a checking account. The lender then gave the customer 85% of the face value of the check in cash, and agreed not to present the check to the bank for two weeks, or until the customer’s next paycheck. In return for the delay in presenting the check, the lender would retain 15% of the check’s face value. If, at the time he received his next paycheck, a customer still did not have enough money to cover the check, he could renew the loan by making another payment of 15% of the amount of the original loan. The customer continued to make these 15% payments until the check was cashed.

The annual interest rate on payday loans generally exceeds 400%; therefore, absent statutory authorization, such loans are usurious. Payday loans were authorized by former N.C. Gen. Stat. § 53-281, which expired on 31 August 2001. The next day, 1 September 2001, defendant “Advance Til Payday” reopened as defendant “Advance Internet.” The key issue raised by plaintiff’s summary judgment motion was whether the evidence established, as a matter of law, that defendants offered loans at usurious interest rates after 31 August 2001.

Advance Internet transactions share many substantive features of the deferred deposit loans offered by Advance Til Payday. As with payday loans, the Advance Internet customer (1) shows proof of employment and of a checking account; (2) receives an immediate cash payment; and (3) is obligated to repay both the cash advance and periodic accrued payments. The Advance Internet customer is liable for this debt until he either makes payments of 20% of the original cash advance every two weeks for a year;¹ or repays the cash advance and all accrued periodic payments. In these respects, the new contract is essentially the same as a payday loan, except that the fees are 20% rather than 15%.

The only difference between check-cashing loans offered by Advance Til Payday and the Advance Internet transactions is that Advance Internet customers now execute documents purporting to be for internet service. To obtain an immediate cash advance, an Advance Internet customer must sign a contract stating that he is

1. Thus, a customer who cannot repay the cash advance as a lump sum will have to make 26 payments of 20% of the cash amount, or \$520 on a \$100 cash advance.

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subscribing to a year of “internet access,” and another document stating that the cash payment is not a loan. This contract, in addition to obligating the customer to repay the cash advance and periodic fees, also allows him to use defendants’ office computers for a few hours a week, and to make limited use of other office equipment to fax or scan documents.

On the basis of these additional features of the new contracts, defendants contend that they are now “internet service providers” offering legitimate contracts for provision of internet services. They call the immediate cash advance a “rebate” on the “internet services” contract, and describe the periodic fees of \$40-\$100 a month as the price for “internet access.” However, this Court does not have to accept defendants’ characterization of these transactions, for “if the form of the transaction is a subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious.” *Bank v. Merrimon*, 260 N.C. 335, 338, 132 S.E.2d 692, 694 (1963) (citing *Ripple*, 193 N.C. 422, 137 S.E. 156). Accordingly, we next examine the competent record evidence, bearing in mind that in responding to a summary judgment motion, “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003).

Uncontradicted evidence establishes that:

1. As Advance Til Payday, defendants offered high interest short term loans. Their advertising emphasized “instant cash.” Advance Internet’s flyers, store signs, and other advertising continued to focus on the immediate cash, and Advance Internet is still listed under “Loans” in some Yellow Pages.
2. Advance Internet continued to use most of the same stores and to employ many of the same people as did Advance Til Payday. Advance Internet also serves many of the same customers as Advance Til Payday.
3. More than 20 affidavits were submitted from Advance Internet customers stating that he or she had signed an Advance Internet contract solely to obtain immediate cash, and not to have computer access. These affidavits were corroborated by

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a phone survey of Advance Internet customers, and by testimony of certain Advance Internet managers and employees. No evidence was offered that any person had ever patronized Advance Internet to obtain internet service[s].

4. An Advance Internet customer must show proof of employment and of a checking account. The amount of cash he receives is determined by reference to the customer's income, rather than his need for computer services.
5. Under Advance Internet contracts, a customer (1) obtains instant cash; (2) is obligated either to pay 20% of the cash amount every two weeks for a year, or else pay back the cash advance and all accrued periodic payments; and (3) generally authorizes defendant to debit his checking account if he is delinquent in these payments.

We conclude that the undisputed evidence of defendants' advertising and business practices "supports the trial court's finding that [defendants'] sale of Internet service is merely a guise for its operation as a small loan business." *Short on Cash.net*, 811 N.E.2d at 826.

We have also considered the scant monetary value of the purported "internet service" offered by defendants. Undisputed record evidence shows that legitimate internet service providers charge less than ten cents an hour for 24 hour a day/7 day a week internet access from a customer's home computer, and access to certain services such as "web-mail" from any computer with internet access. Defendants, on the other hand, charge 100 times more (\$10.00 an hour) for very limited internet access a few hours a week, available only on defendants' office computers, and only by appointment during defendants' business hours. Moreover, North Carolina public libraries offer free access to the internet.

Defendants contend that their charges for internet access are substantially similar to those of other private entities where individuals pay for hourly computer access. However, at such establishments, customers receive the benefit of the contracted-for product, per-hour computer access. As regards Advance Internet contracts, the substance of the "product" is the "cash rebate". And customers who want hourly computer access at other private entities are not required to execute a one-year contract requiring repeated payments on a "rebate". Defendants basically argue that their contracts are the equivalent of agreements between consumers and other private enti-

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ties because the actual per-hour charges are substantially similar. We conclude that this argument is untenable, and that no meaningful comparison can be made between the arrangements at issue and per-hour computer access at other private entities.

Defendants also characterize the monies received by its customers as “cash rebates.” Black’s Law Dictionary defines “rebate” as “[a] return of part of a payment, serving as a discount or reduction.” BLACK’S LAW DICTIONARY 1295 (8th ed. 2004). However, the monies provided to defendants’ consumers do not represent a “return” or a “discount” or a “reduction” of anything. Instead, the “cash rebates” stand alone, and are not related or associated with any “payment” for something of real value. *See Short on Cash.net*, 811 N.E.2d at 825 (applying similar reasoning).

We conclude that the fair market value of Advance Internet contracts is negligible or zero, and that the evidence suggests no rational reason to contract with defendant, except to get immediate cash.

To review, in return for immediate cash, Advance Internet customers must repay both the sum advanced and an additional fee of at least 20% of the amount of cash received. The “internet access” that is the ostensible subject of the contract has little or no monetary value. We conclude that, notwithstanding the facial resemblance to internet service contracts, it is transparently obvious that defendants are offering loans, not *bona fide* internet service contracts. Further, the dollar amount of the periodic payments, when calculated as interest, reveals that the annual rate of interest on these loans is greatly in excess of the maximum permitted under North Carolina law. Such transactions meet the definition of loans offered at usurious interest rates.

Defendants nevertheless argue that the determination of whether their internet service contracts constitute disguised loans is an issue of fact that must be decided by a jury. “Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 468, 597 S.E.2d 674, 694 (2004) (citation omitted). “Determining what constitutes a genuine issue of material fact requires consideration of whether an issue is supported by substantial evidence.” *Eason v. Union Cty.*, 160 N.C. App. 388, 391, 585 S.E.2d 452, 455 (2003) (citing *Dewitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). “ ‘Substantial evidence is such relevant evidence as

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a reasonable mind might accept as adequate to support a conclusion,' and means 'more than a scintilla or a permissible inference[.]' " *Dewitt*, 355 N.C. at 681, 565 S.E.2d at 146 (quoting *Thompson v. Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977), and *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943)) (citation omitted). In the instant case, the uncontradicted material facts provide no basis for a reasonable fact-finder to conclude the Advance Internet contracts were anything other than short-term loans. Because the evidence presents no genuine issue of material fact, the court's summary judgment order constituted a ruling on a question of law.

In reaching this conclusion, we reject defendants' argument that plaintiff must show that in "each and every" transaction, defendant(s) and the customer had the specific "corrupt intent" to enter into a usurious loan agreement. The law is clear that the "corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown." *Kessing*, 278 N.C. at 530, 180 S.E.2d at 827. Further, in none of the cases cited by defendants is the borrower's intent at issue. We also note that this plaintiff's claim is based, not on the personal intentions of individuals, but on defendants' ongoing pattern and practice of executing thousands of essentially identical usurious loan contracts. "Uniform contracts, like all other contracts, must conform to law." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 286, 354 S.E.2d 459, 467 (1987).

Defendants also attach great significance to the issue of whether some customers actually used defendants' computers. Defendants assert that competent record evidence suggests that up to 25% of its customers used their internet services. This assertion is based on the affidavit and deposition testimony of an Advance Internet regional manager, who stated that a fourth of their customers used the computers. This witness conceded that log books were not required before May 2003; that her personal knowledge did not extend beyond the five stores in her region; that she did not know how many hours a week the computers were used; and that she based her opinion on "flipping through" stacks of contracts and glancing at the rebate level of different contracts. This testimony does little to help defendants survive summary judgment because, as discussed above, a customer's

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contractual right to make limited use of defendants' office computers has, at most, a negligible fair market value. Therefore, if some customers used defendants' computers to access the internet, this does not change the reality that such use was incidental to the central purpose of obtaining a cash loan.

We conclude that the evidence establishes as a matter of law (1) that defendants executed contracts for usurious loans, not legitimate sales contracts, and (2) that there is no evidentiary basis upon which a reasonable fact-finder could reach a contrary conclusion. Accordingly, the trial court did not err by entering summary judgment for plaintiff on its claims of usury and violation of the Consumer Finance Act.

[2] Defendants argue next that the trial court erred by granting summary judgment on plaintiff's claim of unfair or deceptive trade practices. We disagree.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991)). "The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citation omitted).

[A] practice is deceptive if it has the tendency to deceive. . . .
'[A] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' . . .
Moreover, where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice.

Id. (quoting *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981), and citing *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991)).

Defendants herein assert that, if one assumes that their customers knew they were executing contracts for a loan rather than internet service, then defendants' conduct was not "deceptive."

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However, “[p]roof of actual deception is not necessary; it is enough that the statements had the capacity to deceive.” *Pinehurst, Inc. v. O’Leary Bros. Realty*, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923 (1986) (citation omitted). We observe that defendants did not inform consumers that they were executing documents in violation of North Carolina’s Consumer Finance Act. On all the facts of this case, we conclude that defendants’ contracts “had the capacity to deceive.”

Moreover, “violations of statutes designed to protect the consuming public and violations of established public policy may constitute unfair and deceptive practices.” *Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995). In this regard, we note that it is a “paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.” N.C. Gen. Stat. § 24-2.1 (2003). Defendants’ practice of offering usurious loans was a clear violation of this policy. We conclude that the trial court did not err by ruling as a matter of law that this constitutes unfair or deceptive trade practices, in violation of N.C. Gen. Stat. § 75-1.1 (2003).

[3] Defendants argue next that the court erred by decreeing that “Advance Internet rebate contracts with North Carolina consumers [were] cancelled pursuant to N.C. Gen. Stat. § 75-15.1,” and by requiring “all funds collected by the defendants pursuant to such contracts . . . be refunded to consumers.” We disagree.

The trial court’s order is clearly authorized by statute. N.C. Gen. Stat. § 53-166(d) (2003) provides in relevant part that any loan made in violation of the statute “shall be void and the licensee or any other party in violation shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan.” And, under N.C. Gen. Stat. § 24-2 (2003), the penalty for charging a higher interest rate than permitted by law is “forfeiture of the entire interest . . . which has been agreed to be paid thereon.”

Defendants’ primary argument is that, because the evidence raised genuine issues of material fact regarding the nature of their contracts, the trial court erred by ordering the contracts voided and money refunded to their customers. Having concluded that the trial court did not err by granting summary judgment for plaintiffs, we necessarily have resolved this issue against defendants. Defendants also argue that the court was required to apportion the defendants’ refund of “funds collected by the defendants pursuant to [Advance Internet] contracts” rather than impose what amounts to joint and several

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liability on them. However, defendants offer no argument or authority to support this position. *See* N.C.R. App. P. 28 (b)(6) (“Assignments of error not set out in appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”).

[4] Defendants next argue that the trial court erred by allowing John Gill to be named as a defendant, and by entering summary judgment against him individually. We disagree.

First, defendants never appealed the order allowing Gill’s addition as a defendant. “Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2.” *Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005) (quoting *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994)). Defendants argue that despite their failure to appeal from the order adding Gill as a defendant, this Court has jurisdiction to review the order under N.C. Gen. Stat. § 1-278 (2003). G.S. § 1-278 states that on appeal, “the court may review any intermediate order involving the merits and necessarily affecting the judgment.” However, “G.S. 1-278 permits us, incident to an appeal from a final judgment or order, to review intermediate orders[.]” *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 696, 364 S.E.2d 723, 725 (1988) (emphasis added). Defendants cite no authority for the proposition that G.S. § 1-278 requires us to review an interlocutory order, and we find none. We conclude that defendants failed to preserve this issue for review.

Secondly, our review of the record makes it clear that the trial court did not err by allowing plaintiff’s motion to amend its complaint. Defendants argue that the trial court erred because the motion for amendment did not assert any grounds upon which Gill might be personally liable for corporate acts. Defendants cite N.C. Gen. Stat. § 57C-3-30 (2003), in support of their position. The statute provides, in pertinent part, that:

- (a) A person who is a member, manager, director, executive, or any combination thereof of a limited liability company is not liable for the obligations of a limited liability company **solely** by reason of being a member, manager, director, or executive and does not become so by participating, in whatever capacity, in the management or control of the business. A member, manager, director, or executive **may, however,**

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become personally liable by reason of that person's own acts or conduct.

- (b) A member of a limited liability company is not a proper party to proceedings by or against a limited liability company[.] . . .

N.C. Gen. Stat. § 57C-3-30(a) and (b) (2003) (emphasis added). Thus, regardless of whether Section 57C-3-30(b) restricts the circumstances in which a member of a limited liability company (LLC) may be added as a party to a lawsuit, Section 57C-3-30(a) clearly anticipates that a member who is also a “manager, director, executive, or any combination thereof” might be made a defendant and “become personally liable by reason of [his] own acts or conduct.”

In the instant case, plaintiff's motion to add Gill as a defendant asserted that NCCS, Loans, Inc. and JAG N.C., LLC were “entirely owned and controlled” by Gill, who also managed and controlled JAGJRTX, LLC; that defendants tried to evade complying with plaintiff's discovery requests by shifting ownership of Advance Internet from JAGJRTX, LLC, to JAG N.C.; and that “Gill may continue to create shell entities in an attempt to evade liability[.]” Plaintiff also submitted a proposed amended complaint alleging that “Gill is the organizer, managing member and principal operator of JAG, NC, LLC” and that “Gill has directed, and is responsible for, all the unlawful practices alleged in this complaint.” (emphasis added). We conclude that these allegations of Gill's “own acts and conduct” were sufficient to allow his addition as a party defendant. “A motion to amend pleadings is addressed to the sound discretion of the trial court; the trial court's ruling is not reviewable absent a showing of an abuse of discretion.” *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (citing *Haas v. Kelso*, 76 N.C. App. 77, 80, 331 S.E.2d 759, 761 (1985)). We conclude that the trial court did not abuse its discretion by granting plaintiff's motion to add Gill as a defendant.

Defendants also argue that the trial court erred by granting summary judgment against Gill, again on the grounds that there was no evidence that would subject him to personal liability. We disagree.

Under N.C. Gen. Stat. § 1A-1, Rule 8(d) (2003), “[a]verments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading.” In the instant case, plaintiff's amended complaint alleged that “Gill has directed, and is

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responsible for, all the unlawful practices alleged in this complaint.” Gill failed to file an answer to the complaint.

We note that “for purposes of summary judgment, a defendant’s failure to file answer does *not* constitute a conclusive admission of the allegations in a plaintiff’s complaint so as to preclude such defendant from offering affidavits or testimony in opposition to the motion.” *Bell v. Martin*, 299 N.C. 715, 720, 264 S.E.2d 101, 104-05 (1980). Accordingly, Gill had the right to offer evidence opposing summary judgment, notwithstanding his failure to file an answer.

However, Gill offered no evidence contradicting plaintiff’s assertion that he directed and controlled the illegal activities of the corporate defendants. We conclude that, because defendant neither filed an answer nor submitted any evidence contradicting the allegations of plaintiff’s complaint, he is deemed to have admitted the allegation in the complaint that “Gill has directed, and is responsible for, all the unlawful practices alleged in this complaint.” We further conclude that the trial court did not err by entering summary judgment against Gill individually.

For the reasons discussed above, we conclude that the trial court did not err by entering summary judgment for plaintiffs, and that the trial court’s order should be

Affirmed.

Judges WYNN and CALABRIA concur.

CDC PINEVILLE, LLC, PLAINTIFF v. UDRT OF NORTH CAROLINA, LLC, DEFENDANT

No. COA04-1505

(Filed 6 December 2005)

1. Trespass— failure to show affirmative defense—negligence—easement by necessity—easement implied from prior use

The trial court did not err by finding that plaintiff established a prima facie case of defendant’s trespass for damage caused by the break in a stub-out on plaintiff’s property from a water pipe serving defendant’s property and that defendant failed to estab-

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lish that it had any affirmative defense to the trespass, because: (1) there was sufficient evidence to support the trial court's finding that defendant owned the water that ran through the water pipe and subsequently flooded plaintiff's property thus causing damage to plaintiff's property; (2) although defendant argues on appeal that plaintiff negligently caused the release of water onto plaintiff's property and that defendant did not intentionally cause the water to enter onto plaintiff's property, at no point in the pleadings did defendant plead plaintiff's negligence as an affirmative defense nor did the trial court make any finding of fact regarding plaintiff's alleged negligence; (3) defendant failed to establish the affirmative defense of easement by necessity since the trial court's findings of fact properly supported the court's conclusions of law that it was not necessary that the pipe or stub-out be located on plaintiff's property in order for defendant to use and enjoy its property; and (4) defendant failed to establish the affirmative defense of easement implied from prior use when defendant did not meet the required test of permanency.

2. Damages and Remedies—reasonableness—trespass

The trial court did not err in a trespass case by awarding plaintiff \$122,918.80 for damage caused by the break in a water pipe, because plaintiffs presented sufficient evidence to allow the trial court to calculate the damages to a reasonable degree of certainty.

3. Appeal and Error—cross-assignment of error—unnecessary to reach issue

Although plaintiff has cross-assigned error to the trial court's findings of fact in a trespass case that the pipe was owned by plaintiff and that the pipe originally was installed on plaintiff's property prior to the severance of title, it is unnecessary to reach this cross-assignment of error because the Court of Appeals already affirmed the trial court's finding that plaintiff established a prima facie case of defendant's trespass and that defendant failed to establish any affirmative defense.

4. Appeal and Error—cross-assignment of error—cross appeal

Although plaintiff has cross-assigned error that there was insufficient evidence to support the trial court's reduction in plaintiff's damages in a trespass case, this cross-assignment of error is dismissed because it is not an alternative basis in law

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for supporting the judgment, but instead constitutes an attack on the judgment itself. The correct method for plaintiff to have raised this question on appeal was to have raised the issue on cross appeal.

Appeal by defendant and cross appeal by plaintiff from the supplemental judgment and order entered 14 September 2004 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 9 June 2005.

Isaacson, Isaacson & Sheridan, LLP, by Jennifer N. Fountain, and Forman Rossabi Black, PA, by Amiel J. Rossabi, for plaintiff-appellee.

Smith Moore, LLP, by Stephen P. Millikin and Lisa Kaminski Shortt, for defendant-appellant.

JACKSON, Judge.

CDC Pineville, LLC (“plaintiff”) is the owner of a tract of land located on Old Pineville Road in Pineville, North Carolina. UDRT of North Carolina, LLC (“defendant”) is the owner of a tract of land located at 5221 Cherrycrest Lane in Pineville, North Carolina. Plaintiff and defendant’s tracts are adjacent to one another, and both tracts previously were owned by a common grantor, Korbler Development Corporation (“Korbler”).

The Korbler family owned a large tract of land, out of which both parties’ tracts eventually were severed. The Korbler family and other partners formed Korbler Development Corporation and Hill Haven Developers (“Hill Haven”) to build a large apartment complex in five phases on the land owned by the Korbler family. In preparing the construction plans, the developer attempted to structure Phase I such that the next phase would tie conveniently into it. After the apartments were completed on Phase I of the construction project, Korbler and Hill Haven abandoned further development plans due to financial difficulties.

In December 1974, Korbler deeded the portion of land that included the apartments to Hill Haven, which later deeded the property to defendant. In January 1975, Korbler deeded a separate parcel of the land to Suitt Construction Company (“Suitt”), which is not a party to this action. The remaining parcel of Korbler’s land, with the exception of a small portion not at issue in this matter, was

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acquired in May 1981 at a foreclosure sale by two partners from Hill Haven. The partners subsequently deeded this remaining parcel to plaintiff.

In October 2000, plaintiff was developing its land for an apartment complex. During the process of grading a portion of the land adjacent to defendant's property, a construction crew employed by plaintiff broke a stub-out from a water pipe serving defendant's property, thereby causing defendant's apartment complex to lose water pressure and supply. The water pipe extended from defendant's property, onto plaintiff's property by way of the stub-out. The construction crew was in the process of grading the land for a private street, and was working solely on plaintiff's property when it struck the pipe. Water flowing from the broken pipe caused damage to the street compaction, sedimentation pond, wetlands, and caused silt to collect in pipes that had been installed for plaintiff's property.

On 6 September 2001, plaintiff filed a complaint against defendant in Guilford County Superior Court. Plaintiff alleged that defendant trespassed onto plaintiff's property when it allowed: (1) a concealed water pipe on plaintiff's property without plaintiff's permission; (2) the water pipe to flood plaintiff's property; and (3) the water pipe to remain on plaintiff's property without plaintiff's permission. Plaintiff also alleged that defendant was negligent in that defendant had a duty to remain within its own property lines, to ensure that its facilities did not encroach on neighboring property, it breached that duty by allowing the water pipe to exist on plaintiff's property and to flood plaintiff's property, and that the damage from the flooding to plaintiff's property was in excess of \$10,0000.00. In its answer, defendant pled the affirmative defenses that, in the water pipe, it had implied easements by necessity and from prior use.

On 2 July 2002, the trial court granted defendant's motion for directed verdict on plaintiff's claim for negligence, but denied its motion for directed verdict for plaintiff's trespass claim. The trial court ordered defendant to pay plaintiff one hundred twenty-two thousand, nine hundred and eighteen dollars and eighty cents (\$122,918.80) plus court costs and interest. In its order, the trial court's conclusions of law stated:

- (2) The use of the water pipe by the grantor, Korbler Development Corporation, prior to the separation of title . . . was not of sufficient duration to show that the easement was so long continued and obviously manifest to show it was

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intended to be permanent despite evidence that the grantor's usage was obvious and manifest. As a result, Defendant did not meet the test for permanency required for an easement from prior use.

- (3) The common grantor of Defendant and Plaintiff did not intend to use one portion of its tract for the benefit of the other.
- (4) The claimed easement by Defendant was not necessary to the use and enjoyment of Defendant's property.
- (5) Defendant did not have the benefit of an implied easement from prior use.
- (6) The common grantor, Korbler Development Corporation, did not intend that grantee, Hill Haven Developers, should have right of access onto Plaintiff's property.
- (7) Neither Korbler Development Corporation nor Hill Haven Developers intended the Defendant's pipe to be in the location where it was found. Therefore, the requisite intent for an implied easement by necessity was not shown by Defendant. It was not necessary for the stub and the pipe located on Plaintiff's property to be there in order for Defendant to use and enjoy Defendant's property. . . .
- (8) Defendant did not have the benefit of an implied easement by necessity when the entry onto Plaintiff's property occurred.
- (9) In that Plaintiff established its prima facie case on trespass and Defendant failed to establish any affirmative defense (including any easement to enter upon Plaintiff's property), Defendant is liable to Plaintiff in trespass.

Defendant appealed the trial court's July 2002 order. On 16 December 2003, this Court remanded the case back to the trial court for further findings of fact and conclusions of law, holding that:

These findings of fact appear to indicate that the pipes were located on property owned by CDC and conveyed by the common grantor, Korbler. Moreover, the findings indicate CDC stipulated to ownership of the land. However, the findings fail to establish when the pipes were placed on CDC's land. Indeed, the record shows that before the conveyances by Korbler, the apartments currently owned by UDRT were in operation and water flowed to

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the tenants. Thereafter, Korbler conveyed the adjoining property to CDC. When the pipe was damaged by CDC's contractors, the apartments lost water pressure and supply. Upon investigation, it was determined CDC's contractors damaged a stub-out which lay underneath a gas line, also damaged by the contractor. The gas line, phone line, and water system ran underneath a paved road and served UDRT's property. This evidence suggests that the pipe was installed by the common grantor, Korbler, before the properties were separately conveyed to CDC and UDRT property. Although CDC argues that UDRT did not meet its burden in demonstrating the pipes were in place before the initial 1974 conveyance, the burden was upon CDC to establish each element of trespass in order to shift the burden to UDRT to present an affirmative defense. . . . [T]he record appears to indicate that CDC owned some of the land in which the water pipes were installed prior to the initial conveyance. However, the findings of fact fail to indicate whether the trial court evaluated this evidence nor are there findings of fact regarding the current ownership of the property as it relates to how it was developed in the early 1970s when the pipes were installed. The significance of additional findings on this issue would shed light on the issue of whether the location of the pipe when it was damaged was the same as it was when the property was commonly owned. If so, then the common grantor would have conveyed ownership of that part of the pipe located on CDC's property to CDC, not UDRT. It would therefore follow that if CDC owned the part of the pipe that it damaged on its property, it could not recover damages based upon a trespass claim. . . . Hence, the findings are inadequate to determine whether UDRT owned the water that damaged CDC's property.

CDC Pineville, LLC v. UDRT of North Carolina, LLC, No. 02-1695, 2003 N.C. App. LEXIS 2296, at *5-8 (N.C. Ct. App. Dec. 16, 2003) (*CDC Pineville I*).

Following argument in chambers on 14 January and 3 August 2004, the trial court made additional findings of fact and conclusions of law. A supplemental judgment and order was filed on 14 September 2004. The supplemental judgment and order restated and amended specific findings and conclusions of law from the original July 2002 order, and also made additional findings of fact and conclusions of law which supplemented the findings and conclusions of the original order. All findings of fact and conclusions of law from the original

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order that were not amended by the supplemental judgment and order remained in full force and effect. Defendant now appeals from this judgment.

[1] Defendant contends that the trial court erred in finding that plaintiff proved its *prima facie* case of trespass. Specifically, defendant asserts that it took no action to cause the water to flow onto plaintiff's property, and that the pipe was owned and controlled at all times by plaintiff. Further, defendant argues that plaintiff, by its own negligence, caused the water to divert from its normal path resulting in damage to its property.

"In order to establish a trespass to real property, a plaintiff must show: (1) his possession of the property at the time the trespass was committed; (2) an unauthorized entry by the defendant; and (3) resulting damage to the plaintiff." *Shadow Grp., LLC v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 201, 579 S.E.2d 285, 287 (2003). Further, without a showing of negligence, "trespass to land requires an intentional entry" onto the land of another. *Indus. Ctr. v. Liab. Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 506 (1967). In the instant case, neither party disputes the fact that damage was done to plaintiff's property as a result of the break in the water pipe. Further, neither party disputes the fact that the water pipe ran from the water meter at the northern edge of defendant's property, across defendant's property, and that the stub-out crossed defendant's property line onto plaintiff's property, where it then extended onto plaintiff's property.

A trial court's findings of fact are binding on appeal, provided they are "supported by any competent evidence in the record." *Patterson v. Taylor*, 140 N.C. App. 91, 95, 535 S.E.2d 374, 377 (2000). "Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); *see also Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). However, a trial court's conclusions of law are fully reviewable on appeal. *See State v. Barber*, 335 N.C. 120, 436 S.E.2d 106 (1993), *cert. denied*, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994).

It is undisputed that plaintiff owned the land at the time and place where the pipe was damaged. The trial court found as fact that "[t]he water flowing through the damaged water pipe was owned by Defendant at the time of the break." This finding was uncontested on

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appeal by either party, and thus is binding on the court. The trial court further found that:

2. Water flowed from Defendant's property, through Plaintiff's pipe and onto Plaintiff's property, causing damage to Plaintiff's property. Plaintiff did not authorize Defendant's entry onto Plaintiff's property. (Restated original finding of fact 13)

....

4. Only that portion of the water pipe which was located on Plaintiff's property as found in 2000 was owned by Plaintiff. (Supplemental finding of fact 4)

....

14. Once the water passes through the water meter located at the northern end of Defendant's property, Defendant becomes the owner of the water that comes onto and services its property. (Supplemental finding of fact 14)

Of the above findings of fact, only supplemental finding of fact four is uncontested and thus binding on appeal. Plaintiff contests restated finding of fact number two, in that the court found that plaintiff owned the pipe, and defendant contests supplemental finding number fourteen, in that the court found that defendant owned the water that passed through its water meter. The trial court was presented with testimony that defendant owned the water pipe that extended from its water meter onto its property, and that once water passes through a water meter that measures the amount of water for which the owner will be billed, the owner of the pipe beyond the meter then becomes owner of the water. Testimony presented also showed that at the time of the break in the pipe, defendant had to turn off the water in order to stop the flooding onto plaintiff's property, thereby evidencing that defendant ultimately had control over the water. Based on the testimony presented at trial, we hold there was sufficient evidence to support the trial court's finding that defendant owned the water that ran through the water pipe and subsequently flooded plaintiff's property, thereby causing damage to plaintiff's property.

Neither party disputes the fact that plaintiff did not authorize defendant to enter onto plaintiff's property. Defendant argues on appeal that plaintiff negligently caused the release of water onto plaintiff's property, and that defendant did not intentionally cause the water to enter onto plaintiff's property. However, at no point in the

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pleadings did defendant plead plaintiff's negligence as an affirmative defense, nor did the trial court make any finding of fact regarding plaintiff's alleged negligence. Thus, we cannot find defendant's argument on this issue to be meritorious, and we hold there was sufficient evidence presented at trial to support the trial court's conclusion that plaintiff had established a *prima facie* case of defendant's trespass.

As an affirmative defense to trespass, a defendant may assert that its entry onto plaintiff's land "was lawful or under legal right." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 628, 588 S.E.2d 871, 874 (2003) (citing *Hildebrand v. Tel. Co.*, 216 N.C. 235, 236, 4 S.E.2d 439, 439 (1939)). In the instant case, the trial court concluded as a matter of law that defendant failed to establish that the existence of the pipe on plaintiff's property constituted an implied easement by prior use or necessity, and thus defendant had failed to establish any affirmative defense to plaintiff's claim of trespass.

Defendant contends the trial court erred in finding that it did not have an easement by necessity. Defendant specifically argues that the property was owned and conveyed by a common grantor, the easement in land in which the water pipe was laid became necessary upon separation of title, and when the pipe was installed, Korbler intended that Hill Haven have the right of access.

In order to establish an easement by necessity, one must show that: "(1) the claimed dominant parcel and the claimed servient parcel were held in a common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became 'necessary' for the claimant to have the easement." *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996) (citing *Harris v. Greco*, 69 N.C. App. 739, 745, 318 S.E.2d 335, 339 (1984)). One need not show absolute necessity, only "physical conditions and use which would 'reasonably lead one to believe that the grantor intended the grantee should have the right of access.'" *Id.* at 331, 469 S.E.2d at 578 (citations omitted). The right to use the easement "must be necessary to the beneficial use of the land granted, 'and to its convenient and comfortable enjoyment, as it existed at the time of the grant.'" *Id.* (citation omitted). If an easement by necessity is to be created, it will be created, if at all, upon conveyance from the common ownership. *See Boggess v. Spencer*, 173 N.C. App. 614, 619, 620 S.E.2d 10, 13 (2005) (citing *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 37 (1986)).

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In this case, the trial court found as fact, which neither party contested, that neither Korbler nor Hill Haven ever intended for the pipe to be located on the tract which later became plaintiff's property. Further, the trial court found, and the testimony presented at trial tended to show, that no one involved in any of the construction projects or conveyances had any knowledge that the pipe had been installed south of the boundary line for Phase I, which later became the property boundary between the parties' properties. Testimony from William Korbler, former secretary of Korbler Development Corporation, indicated that the water pipe was installed to service Phase I of their project, and that Korbler Development Corporation hoped to be able to tie into that water pipe as they developed future phases of their project. The future phases were to be constructed on other portions of Korbler's land. He also testified that at no time during the construction on Phase I, when the pipe was installed, was there any construction or work done on the property which later became plaintiff's property.

The trial court concluded as a matter of law that Korbler, the common grantor, never intended to use one part of its property for the benefit of another. Accordingly, we hold there was sufficient evidence presented at trial to support the trial court's findings that the parties involved in the construction of Phase I and the subsequent conveyances believed that the pipe had been installed completely on defendant's property, and that although Korbler may have intended to "tie into" the water pipe in the future, there was insufficient evidence to show that it intended to use the Phase I property to benefit its other tracts of land.

The trial court also found that defendant's source of water originated at the northern edge of its property, opposite of its southern boundary with plaintiff's property. Thus it was not necessary that defendant's water pipe be located on plaintiff's property in order for defendant's property to have access to water. In addition, testimony presented at trial showed that following the break in the water pipe, defendant paid a utility contractor to move the water pipe so that it existed solely on defendant's property. This testimony weighs heavily on the issue of whether or not it was *necessary* that the pipe be located on plaintiff's property such that defendant could make beneficial use of its land. The trial court's findings of fact properly support the court's conclusions of law that it was not necessary that the pipe or stub-out be located on plaintiff's property in order for defendant to use and enjoy its property thus, there was no easement by necessity.

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Therefore, we hold the trial court did not err in concluding that defendant failed to establish that it had an affirmative defense of easement by necessity.

Defendant next asserts that the trial court erred in determining that it did not have an implied easement from prior use.

To have established an implied easement by prior use, defendant was required to prove that:

(1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was “apparent, continuous and permanent,” and (3) the claimed easement is “necessary” to the use and enjoyment of plaintiffs’ land.

Metts v. Turner, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002) (citing *Knott v. Washington Hous. Auth.*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984)). “[A]n ‘easement from prior use’ may be implied ‘to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer.’” *Knott*, 70 N.C. App. at 97-98, 318 S.E.2d at 863 (citation omitted). Thus, defendant had to show that the use of the purported easement existed prior to the severance of title by Korbler, and that at the time of the severance, Korbler intended that the use would continue. The use of the easement must be “so . . . long continued as to show it was meant to be permanent.” *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 144, 461 S.E.2d 17, 23 (1995) (citation omitted) (holding eighteen months is insufficient to establish an easement by prior use). A review of our State’s caselaw “indicates the shortest time heretofore recognized as sufficient to imply an easement is thirteen years.” *Id.* (citing *Potter v. Potter*, 251 N.C. 760, 112 S.E.2d 569 (1960)). The majority of cases finding an easement by prior use were cases with a use in excess of 30 years. *Id.*; see, e.g., *Spruill v. Nixon*, 238 N.C. 523, 78 S.E.2d 323 (1953) (at least 35 years); *Biggers v. Evangelist*, 71 N.C. App. 35, 321 S.E.2d 524 (1984), *disc. rev. denied*, 313 N.C. 327, 329 S.E.2d 384 (1985) (30 years); *McGee v. McGee*, 32 N.C. App. 726, 233 S.E.2d 675 (1977) (60 years); *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E.2d 509 (1969) (42 years).

As found by the trial court, and supported by testimony presented at trial, the water pipe was installed during the construction of Phase I, which ended in 1973. Korbler then conveyed the Phase I property to Hill Haven in 1974; it conveyed a separate tract of its land

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in 1975; and the remaining property, which is now plaintiff's property, was lost in a foreclosure sale in 1981. Although Korbler intended the water pipe to be permanent at the time it was installed, there was no evidence presented indicating that Korbler Development Corporation intended that the grantees of its other tracts of land would be permitted to utilize the water pipe and stub-out that existed on plaintiff's property. There was testimony and evidence presented that when Korbler conveyed the tract to Suitt in 1975, it also conveyed an easement to allow Suitt to tie into the Phase I water and sewer lines, but not at the stub-out and water pipe which later was found on plaintiff's property. In addition, the use of the water pipe by Korbler was not of sufficient duration prior to severance of title to comport with our caselaw giving rise to an easement by prior use.

Therefore, we hold the trial court's findings of fact were supported by competent evidence, and thus supported the court's conclusions of law finding that defendant failed to meet the test for permanency as required to establish an easement by prior use. The court therefore acted properly in finding that defendant failed to establish the affirmative defense of easement by prior use.

[2] Defendant further contends the trial court erred by awarding plaintiff \$122,918.80 for damage caused by the break in the water pipe. Defendant specifically argues that the evidence of the damages, the bills presented as evidence at trial, consisted of nothing more than a "mere recitation by plaintiff of its damages."

A plaintiff has the burden of proving the amount of the "loss with reasonable certainty." *Erler v. Aon Risks Servs., Inc.*, 141 N.C. App. 312, 319, 540 S.E.2d 65, 70 (2000) (quoting *Phillips v. Ins. Co.*, 43 N.C. App. 56, 58, 257 S.E.2d 671, 673 (1979)). A plaintiff must present data showing a basis for the reasonableness of the loss amount, however "proof to an absolute mathematical certainty is not required." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002), *disc. rev. denied*, 356 N.C. 694, 577 S.E.2d 889 (2003). If there is a question regarding the reliability of the evidence presented to support an award of damages, the questions should go to the weight of the evidence, and generally should not be grounds for exclusion of the evidence. *See Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 95, 618 S.E.2d 739, 744 (2005) (citing *State Prop., LLC*, 155 N.C. App. at 76, 574 S.E.2d at 188).

Here, plaintiff presented evidence that D&M Builders was employed by plaintiff to construct the apartment buildings on plain-

tiff's land. D&M Builders was hired not only to perform the construction, but also to oversee and manage all aspects of the project. Plaintiff presented documentary evidence of all of the bills plaintiff and D&M Builders received for work done in order to repair the damage caused by the break in the water pipe. After the break in the pipe, D&M created a specific code in its billing system so that it could track all of the work related to repairing the damage caused by the water. The superintendent of the plaintiff's project, an employee of D&M, testified that the water that came from the broken pipe caused serious erosion to the already compacted construction site and to the area that had been prepared for a road, and that it caused serious flooding and damage to the sedimentation pond and the wetlands that abutted plaintiff's property. At the time of the trial, plaintiffs and D&M Builders still were incurring fines and expenses as a result of continuing damage to the wetlands, caused by the flooding. Testimony also showed that the entire construction project was delayed for nearly thirty days, in order to repair the erosion, remove the silt from pipes installed on plaintiff's property, and repair other aspects of the project.

Testimony showed that all bills which were addressed to D&M Builders, as managers of the project, were paid by D&M Builders, and then plaintiff reimbursed D&M Builders. Both the superintendent from D&M Builders and one of plaintiff's managing members, testified that they witnessed the work being done, all of the bills presented as evidence had been paid in the ordinary course of business, all of the work done and amounts paid were reasonable, and the expenses were incurred as a result of defendant's water flooding onto plaintiff's property. Defendant objected to the admission of the bills into evidence, but did not produce any evidence to dispute the amount of the charges or that they actually were paid. Therefore, we conclude that plaintiffs presented sufficient evidence to allow the trial court to calculate the damages to a reasonable certainty, thus supporting the trial court's findings and award of \$122,918.80 in damages to plaintiff.

[3] Plaintiff has cross-assigned error to the trial court's findings of fact that the pipe was owned by plaintiff, and that the pipe originally was installed on plaintiff's property prior to the severance of title. Plaintiff argues that no competent evidence was presented at trial to support these findings.

Rule 10(d) of the North Carolina Rules of Appellate Procedure provides that "an appellee may cross-assign as error any action or

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omission of the trial court which . . . deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.” N.C. R. App. P. 10(d) (2005). As we have found no error in the trial court’s finding that plaintiff established a *prima facie* case of defendant’s trespass, for which defendant failed to establish any affirmative defense, it is unnecessary to reach plaintiff’s cross-assignments of error regarding the trial court’s findings that at the time of the break plaintiff owned the portion of the pipe on its property, or that the pipe was installed on plaintiff’s property prior to the severance of title.

[4] As plaintiff’s final cross-assignment of error, plaintiff argues that there was not sufficient evidence to support the trial court’s reduction in plaintiff’s damages. As previously stated, cross-assignments of error must be limited to an “alternative basis in law for supporting the judgment.” Plaintiff’s cross-assignment of error regarding the damages award is not an alternative basis, but rather constitutes an attack on the judgment itself. Plaintiff’s arguments concerning the damages award attempt to show how the trial court erred in its findings of fact and conclusions of law, and do not provide an “alternate basis” for supporting the court’s award of damages. The correct method for plaintiff to have raised this question on appeal was to have raised the issue on cross appeal. See *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors*, 134 N.C. App. 468, 473, 518 S.E.2d 28, 32 (1999); *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990). Plaintiff failed to properly cross-appeal and thus waived this Court’s consideration of the issue on appeal. See *Williams v. N.C. Dep’t of Env’t & Natural Res.*, 166 N.C. App. 86, 95, 601 S.E.2d 231, 236 (2004); *Lewis v. Edwards*, 147 N.C. App. 39, 51-52, 554 S.E.2d 17, 24-25 (2001). Therefore, we dismiss plaintiff’s final cross-assignment of error.

We therefore hold the trial court properly found that plaintiff established a *prima facie* case of defendant’s trespass, and that defendant failed to establish that it had any affirmative defense to the trespass. We also hold the trial court’s award of damages to plaintiff was proper.

Affirmed.

Judges HUDSON and STEELMAN concur.

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STATE OF NORTH CAROLINA v. JAAMALL DENARIS OGLESBY, DEFENDANT

No. COA04-1534

(Filed 6 December 2005)

1. Appeal and Error— preservation of issues—denial of motion in limine—no objection at trial

An appeal was heard from the denial of a pretrial motion to suppress, even without an objection at trial, to prevent a manifest injustice to a defendant who may have relied on a statute presumed to be constitutional at the time of trial. N.C.G.S. § 8C-1, Rule 103(a)(2).

2. Juveniles— questioning—requested presence of aunt denied—not a parent, custodian, or guardian

A juvenile defendant had no right to the presence of an aunt during questioning pursuant to N.C.G.S. § 7B-2101, and his motion to suppress was correctly denied, because the aunt was not a custodian or guardian where defendant had never lived with the aunt, she neither had custody of him nor signed school papers on his behalf, and there was nothing to indicate that any governmental entity conferred legal authority on the aunt.

3. Criminal Law— defendant shackled during trial—no abuse of discretion

There was no abuse of discretion in ordering a defendant shackled during trial where the bailiff had expressed concern that defendant would run, the matter was addressed in defendant's presence but without the jury, the shackles were not to be seen by the jury, defendant would not have to walk or stand before the jury in shackles, and, although the jury was not instructed to ignore the shackles, there was no showing that the jurors were aware of or affected by the restraint.

4. Homicide— first-degree murder—short-form indictment—validity

An indictment which did not address all of the elements of first-degree murder was valid.

5. Sentencing— aggravating factor—*Blakely* error

The trial court erred when sentencing defendant in the aggravated range for armed robbery by finding an aggravating factor where the facts on which the factor was based were neither

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presented to the jury, proved beyond a reasonable doubt, nor stipulated by defendant.

6. Constitutional Law— double jeopardy—felony murder and underlying felony

The trial court violated double jeopardy by sentencing defendant for both first-degree kidnapping and attempted armed robbery where the jury had been instructed that both could be the underlying felony for felony murder. While there is an argument that judgment could be entered on neither underlying felony, prior Court of Appeal decisions require arrest of judgment on one of those felonies.

Appeal by Defendant from judgments entered 28 May 2004 by Judge Catherine C. Eagles in Superior Court, Forsyth County. Heard in the Court of Appeals 23 August 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

WYNN, Judge.

Once a juvenile in custody requests the presence of a parent, or any one of the parties listed in North Carolina General Statute section 7B-2101 (2004), the juvenile may not be interrogated further until counsel, parent, guardian, or custodian has been made available to him. *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002). Here, Defendant (a sixteen-year old juvenile) contends that the trial court should have suppressed his statements made after his request to call his aunt during a custodial interrogation. Because Defendant's aunt was neither a parent nor one of the listed parties in General Statute section 7B-2101, we hold that he had no right to her presence during police questioning.

However, we remand for resentencing on the two counts of robbery with a dangerous weapon under the *Blakely* decision, and remand to arrest judgment on the first-degree kidnapping or the attempted robbery with a dangerous weapon offenses on double-jeopardy grounds.

The record reflects that on the morning of 10 September 2002, Ronnie Owens and Scott Jester worked as cleaners at Copeland's

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Restaurant in Winston-Salem. At around 4:00 a.m., Owens could not find Jester; noticed that his car was missing; and at around 7:00 a.m., reported those facts to a police officer. Jester's body was later discovered on the side of a road and the car was recovered.

Meanwhile, during the early morning hours of that same day, Sarah Cranford met her boyfriend, Antwan James, at his apartment along with Robert Davis and Defendant Jaamall Denaris Oglesby. At their instruction, she eventually drove the men in her vehicle to Copeland's Restaurant because Defendant said he needed to pick up money that someone owed him. At Copeland's, Defendant and Davis exited the vehicle and later returned driving another vehicle containing a third passenger, Jester. Davis instructed Cranford to follow them and the two cars drove on Interstate 40 until Davis stopped at the US 52 South exit. Thereafter, Defendant pushed Jester out from the back seat, exited the car with a gun in his hand, ordered Jester to lay face down on the ground, began to walk away, and then shot him three times in the back of the head. Defendant got back into the vehicle and drove off with Cranford following in her car.

Learning that the police wanted to speak to James, Cranford drove James to the police station on 11 September 2002. Cranford also spoke to the police and later pled guilty to being an accessory after the fact to murder.

The police also interviewed Davis who told of two robberies taking place on 7 and 8 September 2002, in the commission of which Defendant used the same gun as that used to kill Jester. At Defendant's trial, Davis testified about the murder of Jester stating that Defendant made Jester get out of the car, Jester pled for his life and told Defendant he had a young child, and Defendant shot Jester three times in the back of the head. Davis pled guilty to second-degree murder, second-degree kidnapping, and attempted robbery.

Defendant also made statements to the police, confessing to the robberies on 7 and 8 September 2002, to which Defendant later pled guilty, and ultimately confessing to the murder of Jester. Defendant, who was sixteen years old at that time, was advised of his Miranda rights and signed a writing stating:

I have read or had read to me the above statement of my rights, and had rights explained to me by a police officer. Knowing these rights, I do not want a lawyer, parent, guardian, or custodian present at this time. I waive these rights knowingly. I willingly agree to answer questions and/or make a statement.

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During his interrogation, Defendant asked to telephone his aunt but did not provide the name of his aunt; inform the police that his aunt was a parent, guardian, or custodian; or ask for her presence during the interrogation.

Defendant was convicted of felony murder, first-degree kidnapping, and attempted robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole for the felony murder, in the presumptive sentence ranges for first-degree kidnapping and attempted robbery, and in the aggravated sentence range for the two counts of robbery with a dangerous weapon.

On appeal to this Court, Defendant first argues that the trial court erred in denying his motion to suppress his statement made during a custodial interrogation because officers did not cease questioning after he asked to call his aunt. The State responds that this argument is neither preserved for appellate review nor meritorious.

[1] A pretrial motion to suppress is a type of motion *in limine*. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). “[A] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial.” *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citations omitted). “[T]hus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.” *T & T Dev. Co. v. S. Nat’l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 349 (1997) (citation omitted). “[A] party must have presented to the trial court a timely request, objection or motion” at trial to preserve the subject of the suppression motion for appeal. N.C. R. App. P. 10(b)(1).

Before trial, Defendant brought a motion to suppress his statement made during a custodial interrogation when officers did not cease questioning after Defendant asked to call his aunt. However, Defendant failed to object to the evidence during trial. Defendant therefore failed to preserve for appeal the question of the admissibility of his statement.

The General Assembly recently amended Rule 103(a) of the North Carolina Rules of Evidence to provide that “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either

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at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2004). This Court, however, recently held that “to the extent that N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C. R. App. P. 10(b)(1), it must fail[,]” and that a motion to suppress made prior to trial does not preserve the subject of the suppression motion for appeal. *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692 (2005). Nonetheless, because it would be a manifest injustice to Defendant not to review his appeal on the merits where he may have relied on a procedural statute that was presumed constitutional at the time of trial, we review the issue under Rule 2 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 2.

[2] General Statutes section 7B-2101 states, *inter alia*, that “[a]ny juvenile in custody must be advised prior to questioning: . . . [t]hat the juvenile has a right to have a **parent, guardian, or custodian** present during questioning[.]” N.C. Gen. Stat. § 7B-2101 (emphasis added). “Once a juvenile defendant has requested the presence of a parent, or any one of the parties listed in the statute, defendant may not be interrogated further ‘until [counsel, parent, guardian, or custodian] has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.’” *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002) (quoting *Michigan v. Jackson*, 475 U.S. 625, 626, 89 L. Ed. 2d 631, 636 (1986) (internal citations and quotations omitted)). Where the presence of a party not listed in the statute is requested, however, nothing indicates that the interrogation should be halted.

Defendant concedes in his appellate briefing that his aunt was neither a parent nor a custodian. Instead he argues that his aunt was a guardian.

In *State v. Jones*, 147 N.C. App. 527, 540, 556 S.E.2d 644, 652 (2001), *disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002), this Court held an aunt to be a guardian for purposes of General Statute section 7B-2101. The Court indicated that the defining feature of guardianship is legal authority conferred by the government upon the guardian as to a minor. *Id.* In *Jones*, the aunt not only fed, clothed, and housed the defendant, but also received welfare payments for the defendant’s care and enrolled the defendant in school. *Id.* at 535-40, 556 S.E.2d at 650-52. Because both the Department of Social Services and the local school system gave the aunt lawful authority over the defendant, the aunt was deemed to be the defendant’s guardian. *Id.* at 540, 556 S.E.2d at 652.

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In the case at bar, Defendant's aunt acknowledged that Defendant had never lived with her, and that she neither had custody of him nor signed school papers on his behalf. Nothing before this Court indicates that any governmental entity conferred legal authority on the aunt as to Defendant. The aunt was, therefore, not a guardian. Because Defendant's aunt was not a parent, custodian, or guardian, he had no right to her presence during questioning pursuant to General Statute section 7B-2101. Defendant's argument is therefore without merit.

[3] Defendant next contends that the trial court erred in overruling his objection to being restrained during his trial without making findings of fact and where no evidence supported shackling.

A trial court may order that a defendant be physically restrained when the court "finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons" N.C. Gen. Stat. § 15A-1031 (2004). "The propriety of physical restraints depends upon the particular facts of each case[.]" *State v. Thomas*, 134 N.C. App. 560, 568, 518 S.E.2d 222, 228 (1999). "When the trial court orders a criminal defendant restrained at trial, 'the test on appeal is whether, under all of the circumstances, the trial court abused its discretion.'" *State v. Forrest*, 168 N.C. App. 614, 621, 609 S.E.2d 241, 245 (2005) (quoting *State v. Tolley*, 290 N.C. 349, 369, 226 S.E.2d 353, 369 (1976)); *State v. Holmes*, 355 N.C. 719, 727, 565 S.E.2d 154, 161 (2002) (where the defendant failed to object on constitutional grounds at trial, "[w]e address only whether the trial court abused its discretion in ordering that defendant be restrained.").

If the judge orders a defendant or witness restrained, he must:

- (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
- (2) Give the restrained person an opportunity to object; and
- (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

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N.C. Gen. Stat. § 15A-1031. Where the record does not indicate that a defendant's shackles are visible to the jury, "the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors," and the defendant will not be entitled to a new trial on that basis. *Holmes*, 355 N.C. at 729, 565 S.E.2d at 163.

Here, the trial court did not abuse its discretion in ordering Defendant restrained with leg shackles. The bailiff requested that Defendant be shackled out of concern about Defendant's "wanting to run[.]" Defendant's counsel objected but also conceded "I understand the security concerns . . .[.]" and the trial court addressed out of the presence of the jury but in the presence of Defendant the reason for the restraint. The trial court ensured that the leg shackles could not be seen by the jury, directing the bailiff to different areas of the courtroom to test what could be seen from different vantage points. Moreover, defense counsel requested, and the trial court agreed, that Defendant would not have to stand or walk in the shackles in front of the jury. And while the trial court did not instruct the jury to disregard the shackles, there is no showing that the jurors were affected by, or even aware of, the restraint. Any error in not instructing the jury about the restraint was therefore harmless. *State v. Simpson*, 153 N.C. App. 807, 809, 571 S.E.2d 274, 276 (2002).

[4] Defendant next contends that the trial court erred in failing to dismiss the murder indictment where it unconstitutionally failed to allege all of the elements of first-degree murder. Defendant, however, recognizes that this argument has been rejected. *See, e.g., State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). This argument is without merit.

[5] Defendant next contends that, regarding the two counts of robbery with a dangerous weapon, the trial court erred in finding an aggravating factor and sentencing him within the aggravated range in violation of his Sixth Amendment right to a jury trial. *See Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

Recently, our Supreme Court recognized that under the *Blakely* holding, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256, 265 (2005); *see State v. Speight*, 359 N.C. 602, 606, 614 S.E.2d 262, 264 (2005). The Court therefore held that "those portions of N.C.G.S. § 15A-1340.16

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(a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence violate the Sixth Amendment to the United States Constitution.” *Allen*, 359 N.C. at 438-39, 615 S.E.2d at 265. Accordingly, our Supreme Court concluded that “*Blakely* errors arising under North Carolina’s Structured Sentencing Act are structural and, therefore, reversible *per se*.” *Id.* at 444, 615 S.E.2d at 269.

In this case, the trial court found the following aggravating factor: “The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.” The facts for this aggravating factor were neither presented to a jury nor proved beyond a reasonable doubt. Nor did Defendant stipulate to this aggravating factor. *Allen*, 359 N.C. at 439, 615 S.E.2d at 265 (“[U]nder *Blakely* the judge may still sentence a defendant in the aggravated range based upon the defendant’s admission to *an aggravating factor* enumerated in N.C.G.S. § 15A-1340.16(d).” (emphasis added)). Following our Supreme Court holdings in *Allen* and *Speight*, we must remand this matter for resentencing since the aggravating factor was neither a prior conviction nor admitted by Defendant.

[6] In his final assignment of error, Defendant contends that the trial court committed reversible error in imposing sentences for the first-degree kidnapping and attempted robbery with a dangerous weapon offenses, both of which the jury was instructed could serve as underlying felonies to the felony murder. “In accordance with the state and federal prohibitions against double jeopardy, our Supreme Court firmly established that ‘a defendant may not be punished both for felony murder and for the underlying, ‘predicate’ felony, even in a single prosecution.’” *State v. Coleman*, 161 N.C. App. 224, 234, 587 S.E.2d 889, 896-97 (2003) (quoting *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986)). The State concedes that the trial court erred in sentencing Defendant on the two underlying felonies.

However, where a court cannot determine the predicate felon(ies) connected to a felony murder conviction, this Court has not granted a new trial, but has remanded the case to the trial court to arrest judgment on at least one of the felony convictions. *See State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002); *see also State v. Freeland*, 316 N.C. 13, 24, 340 S.E.2d 35, 41 (1986) (North Carolina Supreme Court remanding case to trial court where defendant was sentenced separately for first degree rape, first degree sex-

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ual offense, and first degree kidnapping, and instructing trial court to “arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping” or “arrest judgment on one of the sexual assault convictions”); *Coleman*, 161 N.C. App. at 236, 587 S.E.2d at 897 (finding no error in trial court’s discretionary arresting of judgment on defendant’s armed robbery conviction and in sentencing defendant for remaining three armed robbery convictions).

We recognize that there is precedence in our State indicating that since the Court cannot determine the underlying felony supporting Defendant’s felony murder verdict, judgment on both felonies should be arrested. *See, e.g., State v. Barlowe*, 337 N.C. 371, 446 S.E.2d 352 (1994); *State v. Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990); *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981). Our research has not revealed authority in which our Supreme Court has spoken directly to the issue of whether there is a statutory or constitutional violation in sustaining a felony murder guilty verdict that does not require jury unanimity on the predicate felon(ies). *See State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326-27 (1987) (specifically reserving unanimity issue where it was not necessary to resolve the appeal). Nonetheless, in at least one case, our Supreme Court suggested that it would not sanction such a result:

This Court has held that when a defendant has been convicted of murder in the first degree based upon a finding that the murder was committed in the perpetration of a felony, separate punishment may not be imposed for the underlying felony. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). However, separate punishment may be imposed for any offense which arose out of the same transaction but was not the underlying felony for the felony murder conviction. *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981).

In the case *sub judice*, the trial court’s instructions reveal that the only felony upon which defendant’s first degree murder conviction could be based was the felonious burning or attempting to burn IBM Building 201. Thus, the first degree murder conviction under the felony murder rule was premised on the underlying felony of burning or attempting to burn Building 201. . . . The trial court properly arrested judgment on that charge. The felonious entry convictions and the two other felonious burning convictions, because they were not submitted as possible underlying felonies, were neither essential nor indispensable elements of the

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State's proof of murder and were not underlying felonies for the felony murder conviction. *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289. Therefore, imposition of punishment for these convictions was proper.

State v. Avery, 315 N.C. 1, 38, 337 S.E.2d 786, 807 (1985) (emphasis added).

Thus, it is reasonable to conclude that the import of our Supreme Court authorities is that judgment may not be entered on any felony that supports the felony murder verdict under the facts of this case. Indeed, in this case, it would appear that where we cannot know whether, or how many of, the jurors believed the attempted armed robbery and/or first degree kidnaping offenses were causally connected to the killing, judgment should not be entered on either predicate felony because either of them may help support the felony murder conviction. In that light, it could be concluded that only the jury can determine whether there exists a transactional connection between the alleged predicate felon(ies) and the killing such that a guilty verdict on felony murder should be returned.

But we are constrained from reaching that result in this case because our Supreme Court has unequivocally held: "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); see also *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125 (2004) (stating that while a panel of the Court of Appeals "may disagree with, or even find error in, an opinion by a prior panel . . . the panel is bound by that prior decision until it is overturned by a higher court."). Accordingly, we are bound by this Court's decisions in *Dudley* and *Coleman*. We thus remand this matter to the trial court to arrest judgment on the first-degree kidnaping or the attempted robbery offenses as the underlying felony with respect to Defendant's felony murder conviction in such a manner that would not subject Defendant to a greater punishment.

In sum, we remand for resentencing on the two counts of robbery with a dangerous weapon; and remand to arrest judgment on the first-degree kidnaping or the attempted robbery with a dangerous weapon offenses.

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No error in part; remanded in part for resentencing.

Judges CALABRIA and LEVINSON concur.

STATE OF NORTH CAROLINA v. GREGORY REQUINT ARTIS

No. COA05-269

(Filed 6 December 2005)

**1. Prisons and Prisoners— malicious conduct by prisoner—
failure to allege defendant in custody—notice**

The trial court had jurisdiction to proceed with the trial of a charge of malicious conduct by a prisoner even though the indictment did not allege that defendant was in custody, because: (1) the purpose behind alleging that defendant was in custody is to give him proper notice of the charges against him; (2) the evidence tended to show that defendant was an inmate at the Pitt County Detention Center, he was incarcerated when he received notice of the charges, and he raised no objection that he was unaware of the facts giving rise to the charges; and (3) no conclusion could be reached other than that defendant was in custody.

**2. Constitutional Law— double jeopardy—malicious conduct
by prisoner—misdemeanor assault of government
employee**

The trial court did not violate defendant's right against double jeopardy by entering judgment for both malicious conduct by a prisoner and habitual misdemeanor assault even though identical conduct was alleged to establish both malicious conduct by a prisoner and the current misdemeanor assault of a government employee, because: (1) when it is clear that defendant's conduct is violative of two separate and distinct social norms, the fact that both convictions arise out of the same conduct does not violate the double jeopardy clause; (2) malicious conduct by a prisoner requires only that a bodily fluid or excrement be thrown at a government official whereas misdemeanor assault on a governmental official requires that the official either be touched by the instrument of assault or reasonably fear such a

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touching; and (3) the legislature intended to punish two different types of behavior even though defendant's conduct was the same for both offenses.

3. Sentencing—habitual felon—guilty plea—failure to satisfy requirements of N.C.G.S. § 15A-1022(a)

The trial court erred by accepting defendant's guilty plea to habitual felon status and by sentencing defendant for malicious conduct by a prisoner and habitual misdemeanor assault as an habitual felon because the trial court failed to satisfy the requirements of N.C.G.S. § 15A-1022(a) when the trial court did not: (1) determine that defendant understood the nature of the habitual felon charge; (2) inform defendant of his right to deny habitual felon status; or (3) inform defendant that his admission of attaining habitual felon status would waive his right to jury determination of that issue.

4. Criminal Law; Sentencing—habitual misdemeanor assault—absence of arraignment—stipulation of prior convictions

The trial court did not commit prejudicial error by its failure to arraign defendant on a habitual misdemeanor charge or to ask defendant whether he wanted the issue regarding his prior convictions submitted to the jury where defendant requested at trial that his prior convictions not be shared with the jury, and defense counsel, after consultation with defendant, stipulated to the prior convictions. N.C.G.S. § 15A-928.

Appeal by defendant from judgments entered 13 October 2004 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Lorrin Freeman, for the State.

Kevin P. Bradley, for defendant-appellant.

TYSON, Judge.

Gregory Requent Artis ("defendant") appeals from judgments entered after a jury found him to be guilty of malicious conduct by a prisoner and habitual misdemeanor assault. Defendant was convicted of having attained the status of being an habitual felon. We find no error in part, vacate in part, and remand.

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[174 N.C. App. 668 (2005)]

I. Background

Defendant, a detainee at the Pitt County Detention Center in Greenville, North Carolina, was cleaning the center's common area when he was told to return to his cell. Defendant became frustrated, clogged his toilet, and flooded his cell. To prevent further flooding, Detention Officer Steven E. McKinney, ("Officer McKinney") turned off the water in defendant's cell. Defendant told Officer McKinney that he was going to "get" him when he had the opportunity.

Later in the day, Officer McKinney served lunch to the detainees, including defendant, through a small door which meal trays were passed. A detainee assisted Officer McKinney by distributing drinks. The drinks available to the detainees included water, milk, tea, and orange juice. The State's evidence tends to show defendant forcefully threw urine through the small door at Officer McKinney before defendant received his drink. Officer McKinney testified that he could tell the liquid was urine because of its distinct smell and warm temperature. Defendant maintains he threw tea at Officer McKinney.

Officer McKinney immediately asked to be relieved of his duties to remove his clothes and clean himself. The State did not present Officer McKinney's uniform into evidence. He testified that it was standard procedure in the Pitt County Sheriff's Department to immediately wash any uniforms stained by bodily fluids. Officer McKinney reported the incident, but he did not include the names of the inmates who had assisted him while handing out the meals, and he could not remember their names at trial. No other witnesses testified to the incident.

On 13 October 2004, defendant was tried by a jury and found to be guilty of malicious conduct by a prisoner and assault on a government employee which resulted in a conviction for habitual misdemeanor assault. Defendant was sentenced as an habitual felon to an active sentence of a minimum of 168 months and a maximum of 211 months of confinement for his conviction of malicious conduct by a prisoner, such sentence to run at the expiration of the sentence imposed in 03 CRS 58379. For the crime of misdemeanor assault, defendant was sentenced as an habitual felon to a consolidated term of imprisonment of a minimum of 151 months and a maximum of 191 months confinement, such sentence to run concurrently with the sentence imposed for defendant's habitual felon conviction of malicious conduct by a prisoner to commence at the expiration of the sentence imposed in 03 CRS 58379. Defendant appeals.

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II. Issues

Defendant argues: (1) the trial court did not have jurisdiction to proceed with the trial of a charge of malicious conduct by a prisoner when the indictment did not allege that defendant was in custody; (2) the trial court cannot enter judgment for both malicious conduct by a prisoner and habitual misdemeanor assault when identical conduct was alleged to establish both malicious conduct by a prisoner and the current misdemeanor assault of a government employee; (3) the trial court cannot sentence defendant as an habitual felon without a jury's determination of habitual felon status or express waiver of jury determination and admission of habitual felon status by defendant himself; and (4) a stipulation by defense counsel that defendant had been convicted of the prior misdemeanors alleged in an indictment charging habitual misdemeanor assault is not sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury.

III. Allegations in the Indictment

Concerning the allegations in the indictment, defendant argues the trial court: (1) did not have jurisdiction to proceed with the trial of a charge of malicious conduct by a prisoner when the indictment did not allege that defendant was in custody; and (2) cannot enter judgment for both malicious conduct by a prisoner and habitual misdemeanor assault when identical conduct was alleged to establish both malicious conduct by a prisoner and the current misdemeanor assault of a government employee.

A. Defendant's Custody

[1] Defendant argues the indictment did not specifically allege he was in custody and is facially invalid. We disagree.

Defendant did not object to the trial court's jurisdiction at trial. N.C. Gen. Stat. § 15A-1446(d)(4) (2003) provides:

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

. . . .

(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

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In *State v. Wallace*, our Supreme Court held “where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

The indictment charging defendant with malicious conduct by a prisoner and habitual misdemeanor assault failed to specifically allege defendant was “in custody.” The indictment stated, “[a]t the time of the assault S.E. McKinney was performing a duty of his office by supervising the dispensing of food to the defendant.” Defendant argues because the indictment failed to specifically allege he was “in custody,” “the trial court lacks jurisdiction over the defendant and subsequent judgments are void and must be vacated.” *State v. Ellis*, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005) (citing *State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002)).

Article I, Section 23 of the North Carolina Constitution provides, “In all criminal prosecutions, every person charged with a crime has the right to be informed of the accusation.” N.C. Const. Art. I, sec. 23. Therefore, “[a] criminal proceeding must contain . . . (5) [a] plain and concise factual statement . . . which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense . . . with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation.” N.C. Gen. Stat. § 15A-924(a) (2003).

In order to convict defendant of malicious conduct by a prisoner, the State must prove defendant, while in custody, threw bodily fluid at a government employee while the employee was engaged in employment responsibilities. N.C. Gen. Stat. § 14-258.4(a) (2003). N.C. Gen. Stat. § 14-258.4(a) provides:

Any person in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility (as defined in G.S. 153A-217, or G.S. 153A-230.1), including persons pending trial, appellate review, or presentence diagnostic evaluation, who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee’s duties is guilty of a Class F felony. The provisions of this section apply to viola-

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tions committed inside or outside of the prison, jail, detention center, or other confinement facility.

In *State v. Page*, this Court stated, “[t]he requirements of G.S. 15-153 are met where the indictment sets forth in a plain, intelligible and explicit manner all elements of the crime charged.” 32 N.C. App. 478, 481, 232 S.E.2d 460, 462 (citing *State v. Hunt*, 265 N.C. 714, 144 S.E.2d 890 (1965)), *cert. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977). “An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.” *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978).

This Court stated:

A criminal pleading does not have to state every element of the offense charged; it is only necessary to assert facts “supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation.”

State v. Jordan, 75 N.C. App. 637, 639, 331 S.E.2d 232, 233 (quoting N.C. Gen. Stat. § 15A-924(a)(5)), *disc. rev. denied*, 314 N.C. 544, 335 S.E.2d 23 (1985).

In *Jordan*, the defendant was charged with failing to stop at the scene of an accident. *Id.* The defendant argued that the order upon which he was tried was defective because it failed to allege that he knew his car had collided with another car and damaged it. *Id.* This Court held that the defendant’s knowledge could be inferred from the facts. *Id.*

Here, the indictment alleged malicious conduct by a prisoner. The purpose behind alleging that defendant was in custody is to give him proper notice of the charges against him. The evidence tended to show that defendant, an inmate at the Pitt County Detention Center, was incarcerated when he received notice of the charges, and raised no objection that he was unaware of the facts giving rise to the charges. No conclusion could be reached other than that defendant was in custody. This assignment of error is overruled.

B. Identical Allegations

[2] Defense counsel moved that “the judgment be arrested as to one of the charges . . . because of due process and double jeopardy con-

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cerns.” The trial court denied the motion. Defendant argues that the allegations of malicious conduct by a prisoner and habitual misdemeanor assault are based on identical facts and charge the same offense. We disagree.

The Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 19 of the North Carolina Constitution does not expressly prohibit double jeopardy, but the courts have included it as one of the “fundamental and sacred principles of the common law, deeply imbedded in criminal jurisprudence” as part of the “law of the land.”

State v. Ezell, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003) (quoting *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1973)).

The United States Supreme Court in *Blockburger v. United States*, stated:

the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932).

North Carolina has adopted and applied the *Blockburger* test. See *State v. Bailey*, 157 N.C. App. 80, 577 S.E.2d 683 (2003). In *State v. Murray*, our Supreme Court stated:

even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

310 N.C. 540, 548, 313 S.E.2d 523, 529 (1984).

In applying the *Blockburger* test, this Court stated in *Bailey*, “[w]hen utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test.”

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Bailey, 157 N.C. App. at 86, 577 S.E.2d at 688 (quoting *State v. Gardner*, 315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986)).

Our Supreme Court stated that when “it is clear that the conduct of the defendant is violative of two separate and distinct social norms” the fact that both convictions arise out of the same conduct does not violate the double jeopardy clause. *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712.

As noted above, defendant was charged with malicious conduct by a prisoner in violation of N.C. Gen. Stat. § 14-258.4. The crime alleged in the habitual misdemeanor assault indictment is assault of a government employee in violation of N.C. Gen. Stat. § 14-33(c)(4) (2003) which states:

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

. . . .

(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties.

The conduct alleged in both indictments is identical:

the defendant named above unlawfully, willfully, and feloniously did assault S.E. McKinney, a government officer at the Pitt County Detention Center, Greenville, North Carolina . . . by throwing bodily fluid on S.E. McKinney. At the time of the assault S.E. McKinney was performing a duty of his office by supervising the dispensing of food to the defendant.

This Court addressed the differences between misdemeanor assault on a government official and malicious conduct by a prisoner in *State v. Crouse*, 169 N.C. App. 382, 610 S.E.2d 454, *disc. rev. denied*, 359 N.C. 637, 616 S.E.2d 923 (2005). “[M]isdemeanor assault on a government official is not a lesser included offense of felony malicious conduct by a prisoner.” *Id.* at 386, 610 S.E.2d at 457. This Court stated that an

inmate may be guilty of malicious conduct by a prisoner without being guilty of misdemeanor assault on a government official.

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This is so because G.S. § 14-258.4 requires only that a bodily fluid or excrement be thrown “at” a government official, whereas G.S. § 14-33(c)(4) requires that the official either be touched by the instrument of assault or reasonably fear such a touching.

Id. at 388, 610 S.E.2d at 458 (quoting *State v. Cogdell*, 165 N.C. App. 368, 378, 599 S.E.2d 570, 576 (2004) (Levinson, J., concurring)). This Court also stated:

the legislature apparently intended to address a different problem with each offense. Assaults on government officials have been criminalized to punish, and prevent, attacks against government officials trying to perform public duties. Quite differently, the criminalization of malicious conduct by a prisoner is directed at deterring and punishing the projecting of bodily fluids or excrement at governmental employees by those in custody, whether or not such misconduct amounts to an assault.

Id.

The entry of judgment on habitual misdemeanor assault and the underlying offense of assault on a government employee and malicious conduct by a prisoner contains separate elements. Convictions arising from the same incident or similar conduct for both do not violate the double jeopardy clause. This assignment of error is overruled.

IV. Habitual Felon Status

[3] Defendant argues the trial court cannot sentence him as an habitual felon without a jury’s determination of his habitual felon status or his express waiver of jury determination and admission of habitual felon status. We agree.

Defendant did not object to his sentencing as an habitual felon at trial. N.C. Gen. Stat. § 15A-1446(d)(16) provides, “[e]rrors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . (16) Error occurred in the entry of the plea.”

The judgments regarding malicious conduct by a prisoner as a habitual felon and habitual misdemeanor assault as an habitual felon indicate that defendant pled guilty to habitual felon status.

N.C. Gen. Stat. § 15A-1022(a)(1)-(4) (2003) provides:

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S.

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15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him

The State admits that the transcript includes no such inquiry of defendant and no plea agreement exists in the record on appeal. The only dialogue between the trial court and defendant in the transcript concerning his status as an habitual felon occurred when the court asked him, “What do you have to say?” and he responded, “What I say doesn’t matter in this courthouse.”

In *State v. Gilmore*, this Court stated:

[t]he issue of whether Defendant was an habitual felon, however, was not submitted to the jury, and Defendant did not plead guilty to being an habitual felon. Although Defendant did stipulate to his habitual felon status, such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.

142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001) (citations omitted).

Here, the inquiry by the trial court failed to satisfy the requirements of N.C. Gen. Stat. § 15A-1022(a). The trial court did not: (1) determine that defendant understood the nature of the habitual felon charge; (2) inform defendant of his right to deny habitual felon status; or (3) inform defendant that his admission of attaining habitual felon status would waive his right to jury determination of that issue. The record on appeal does not contain a plea transcript of defendant’s guilty plea. Defendant’s habitual felon conviction is vacated. We remand for resentencing.

V. Habitual Misdemeanor Assault

[4] Defendant argues that a stipulation by defense counsel that he has been convicted of the prior misdemeanors alleged in an indict-

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ment charging habitual misdemeanor assault is not sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury. We disagree.

Defense counsel did not object to an entry of judgment on the habitual misdemeanor assault charge at trial. N.C. Gen. Stat. § 15A-1446(d)(16) provides, “[e]rrors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . (16) Error occurred in the entry of the plea.”

The written judgment regarding habitual misdemeanor assault indicates that defendant pled guilty. Defendant argues he was not properly arraigned on the habitual misdemeanor assault charge and that the trial court erred in not discussing with him the effect of a stipulation to his prior convictions.

N.C. Gen. Stat. § 15A-928(a)-(c) (2003) provides:

(a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor’s option, the special indictment or information may be incorporated in the principal indictment as a separate count. Except as provided in subsection (c) below, the State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.

(c) After commencement of the trial and before the close of the State’s case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent.

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The trial court did not inquire of defendant regarding the prior convictions alleged to establish habitual misdemeanor assault. Before imposing sentence the trial court asked defendant, "What do you have to say?" Defendant responded, "I ain't got really nothin to say . . . they know it all, you know. I mean what I say doesn't matter in this courthouse." Defendant contends the failure to arraign him or ask him whether he wanted the issue regarding his prior convictions submitted to a jury prejudiced his rights to a jury trial guaranteed by Article I, Section 24 of the North Carolina Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution.

Our Supreme Court has stated:

The failure to conduct a formal arraignment itself is not reversible error. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges. *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980).

State v. Brown, 306 N.C. 151, 174, 293 S.E.2d 569, 584, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

This Court has stated and defendant concedes that "[w]here there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *State v. McDonald*, 165 N.C. App. 239, 240, 599 S.E.2d 50, 52 (citing *State v. Jernigan*, 118 N.C. App. 240, 244, 455 S.E.2d 163, 166 (1995)), *disc. rev. denied*, 359 N.C. 195, 608 S.E.2d 60 (2004).

In *McDonald*, the defendant argued the trial court did not follow the procedure set forth in N.C. Gen. Stat. § 15A-928. *Id.* Defendant argued that the statute "requires the trial court to arraign defendant on the special indictment and to advise defendant that he may admit, deny, or remain silent on his previous convictions." *Id.* While the trial court failed to arraign the defendant and inform him of his right to remain silent, this Court held such failure was not reversible error. *Id.*

At trial, defendant requested that his prior convictions not be shared with the jury. Prior to the close of the State's evidence, defendant discussed the stipulation with his defense counsel. After consult-

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ing with defendant, defense counsel affirmed on the record defendant's intent to stipulate to the prior convictions when he stated, "the prior convictions listed in count 2 of 04-CRS-11922 . . . For purposes of this trial and whether or not the State has to put on any evidence as part of his habitual case, he would stipulate to those convictions and not contest them." As this Court stated in *Jernigan*:

[s]tatements of an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client.

118 N.C. App. at 245, 455 S.E.2d at 166 (citations omitted). The trial court's failure to formally arraign defendant did not rise to the level of prejudicial error to warrant a new trial. This assignment of error is overruled.

VI. Conclusion

The trial court possessed jurisdiction to proceed with defendant's trial of a charge of malicious conduct by a prisoner when the indictment did not specifically allege that he was "in custody." The trial court properly entered judgment for both malicious conduct by a prisoner and habitual misdemeanor assault even though substantially similar conduct was alleged in both indictments. The Legislature intended to punish two different types of behavior even though defendant's conduct was the same for both offenses.

A stipulation by defense counsel that defendant has been convicted of the prior misdemeanors alleged in an indictment charging habitual misdemeanor assault is sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury.

The trial court erred when it sentenced defendant as an habitual felon without express waiver of jury determination and admission of habitual felon status by defendant himself or a jury determination of habitual felon status. Defendant's habitual felon conviction is vacated, and we remand for resentencing. Defendant's remaining assignments of error are overruled.

No error in part, Vacated in part, and Remanded for Resentencing.

Judges JACKSON and SMITH concur.

STATE EX REL. UTILS. COMM'N v. CAROLINA POWER & LIGHT CO.

[174 N.C. App. 681 (2005)]

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, ATTORNEY GENERAL, ROY COOPER, CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., CAROLINA INDUSTRIAL GROUPS FOR FAIR UTILITY RATES I AND II, VIRGINIA ELECTRIC AND POWER COMPANY D/B/A NORTH CAROLINA POWER, NORTH CAROLINA MUNICIPAL POWER AGENCY NUMBER 1 AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY, INC., APPELLEES V. CAROLINA POWER & LIGHT COMPANY, DUKE POWER COMPANY, AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, APPELLANTS

No. COA02-1737-2

(Filed 6 December 2005)

1. Utilities— wholesale interstate power contracts—regulation—not discriminatory

A regulation requiring notice to the Utilities Commission of wholesale interstate energy contracts was merely burdensome on interstate commerce, and not discriminatory, because it applied equally to wholesale contracts in and out of state. The regulation should therefore be evaluated for whether its effect on interstate commerce is clearly excessive in relationship to putative local benefits.

2. Utilities— wholesale interstate power contracts—regulation not overly burdensome

A utilities regulation requiring notice to the Utilities Commission of interstate contracts for wholesaling electric energy is not overly burdensome to interstate commerce because the local benefit (ensuring the supply of electricity to retail customers) outweighs the interstate burden.

3. Utilities— wholesale interstate power contracts—authority of Commission to regulate

The Utilities Commission has the authority under N.C.G.S. § 62-30 and N.C.G.S. § 62-32(b) to require advance submission of wholesale interstate power contracts. The statutes give the Utilities Commission “all powers” necessary to regulate public utilities to ensure that the citizens of North Carolina are provided reasonable service.

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4. Utilities— wholesale power contracts—Commission order—sufficient for determination of issues

A Utilities Commission order concerning wholesale interstate power contracts was sufficient to allow the Court of Appeals to determine the controverted issues.

Judge TYSON dissenting.

Appeal by Appellants from orders entered 10 July 2002 and 20 August 2002 by the North Carolina Utilities Commission. Heard in the Court of Appeals 16 September 2003. A divided panel of this Court vacated and dismissed with prejudice the orders of the Commission under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, by opinion filed 18 November 2003. *See State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 161 N.C. App. 199, 588 S.E.2d 77 (2003) (Wynn, J. dissenting). The North Carolina Supreme Court reversed this Court and, by opinion filed 1 July 2005, remanded to this Court for “consideration of the remaining” assignments of error. *See State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 614 S.E.2d 281 (2005).

Public Staff Executive Director Robert P. Gruber and Chief Counsel Antoinette R. Wike, by Gisele L. Rankin, Staff Attorney, for appellee North Carolina Utilities Commission.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the Attorney General.

West Law Offices, P.C., by James P. West, for appellee Carolina Utility Customers Association, Inc.

Bailey & Dixon, L.L.P., by Ralph McDonald, for appellee Carolina Industrial Groups for Fair Utility Rates II.

Poyner & Spruill LLP, by Michael S. Colo, Thomas R. West, and Pamela A. Scott, for appellees North Carolina Municipal Power Agency Number 1 and North Carolina Eastern Municipal Power Agency, Inc.

Hunton & Williams, by Edward S. Finley, Jr., for appellants.

Len S. Anthony, for appellants Carolina Power & Light and Progress Energy.

STATE EX REL. UTILS. COMM'N v. CAROLINA POWER & LIGHT CO.

[174 N.C. App. 681 (2005)]

William Larry Porter and Kodwo Ghartey-Tagoe, for appellant Duke Power Company.

Robert B. Schwentker and Thomas K. Austin, for appellant North Carolina Electric Membership Corporation.

WYNN, Judge.

Non-discriminatory state regulations that “effectuate a legitimate local public interest” and incidentally burden interstate commerce “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 178 (1970). Appellants argue that the North Carolina Utilities Commission’s regulation at issue violates the Commerce Clause and is burdensome on interstate commerce. As we find that the local benefit outweighs the incidental burden to interstate commerce, we affirm the Utility Commission’s orders.

This case is on remand to this Court “for consideration of the remaining issues” as mandated by our Supreme Court’s holding in *State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 359 N.C. 516, 529, 614 S.E.2d 281, 290 (2005) wherein the facts pertaining to the issues in this case are fully set forth. *See also State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 161 N.C. App. 199, 588 S.E.2d 77 (2003).

The issues we address on remand are: (1) whether state regulation of wholesale interstate power contracts impermissibly burdens interstate commerce; (2) whether the Utility Commission is authorized under chapter 62 of the North Carolina General Statutes to require the submission of contracts with wholesale interstate purchasers for review prior to execution; and (3) whether the Utility Commission erred in failing to provide guidance by which it would assess the reasonableness of the agreements over which it claims jurisdiction.

[1] Appellants first argue that the Utility Commission’s regulation of wholesale contracts, Regulatory Condition 21, impermissibly burdens interstate commerce. Regulatory Condition 21 requires that a utility shall not enter into contracts for the wholesale of electric energy and/or capacity at native load capacity without first giving the Utility Commission and Public Staff written notice twenty days prior to execution of the contracts.

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In reversing the earlier opinion in this case, our Supreme Court stated that the Utility Commission's purpose, "was to provide a mechanism through which [the Utility Commission] meaningfully could enforce the requirement 'that CP&L's retail native load customers receive priority with respect to, and the benefits from, CP&L's existing generation and that CP&L's wholesale activities not disadvantage its retail ratepayers from either a quality of service or rate perspective[.]'" and it could " 'take appropriate action . . . to secure and protect reliable service to retail customers in North Carolina.' " *Carolina Power & Light Co.*, 359 N.C. at 519-21, 614 S.E.2d at 284. As our Supreme Court has deemed that the record on appeals shows the purpose of the regulation, that purpose is binding on this Court.

Appellants contend that the Utility Commission's regulation of wholesale contracts impermissibly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution. However, the Utility Commission's regulation ensures that North Carolina retail consumers get a reliable source of electricity, and is merely burdensome on interstate commerce and not discriminatory.¹ Accordingly, the regulation should be analyzed under the test set out by the United States Supreme Court in *Pike*, 397 U.S. at 142, 25 L. Ed. 2d at 178. The *Pike* test states that "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

[2] Applying the *Pike* test to the case at hand, the requirement that the companies allow the Commission and Public Staff to review proposed contracts twenty days before they are signed, is not overly burdensome on interstate commerce as the "putative local benefit," to ensure supply of electricity to retail customers, outweighs the burden on interstate commerce. *See Ark. Elec. Coop. Corp. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 394, 76 L. Ed. 2d 1, 17 (1983) (state regulation of the wholesale rates charged by utility to its members is well within the scope of "legitimate local public interests" and does not impermissibly burden interstate commerce).

1. Appellants cite to *City of Philadelphia v. New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475 (1978), to support its argument that the regulation impermissibly burdens interstate commerce. But *City of Philadelphia* involved a New Jersey statute that was facially discriminatory. *Id.* at 628, 57 L. Ed. 2d at 484. In this case, the regulation is not discriminatory, merely burdensome, because the regulation applies equally to wholesale contracts in and out of state. As this regulation is not discriminatory, *City of Philadelphia* is inapplicable.

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As the Utility Commission's regulation does not violate the Commerce Clause, we affirm the Utility Commission's orders.

[3] Appellant also argues that Chapter 62 of the North Carolina General Statutes does not authorize the Utility Commission to require submission of contracts with wholesale purchasers prior to execution.

Pursuant to section 62-30 of the North Carolina General Statutes:

The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties.

N.C. Gen. Stat. § 62-30 (2003). The Utility Commission is also “vested with *all power necessary* to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes[.]” N.C. Gen. Stat. § 62-32(b) (2003) (emphasis added).

Our Supreme Court stated that the Utility Commission's purpose of this regulation, “was to provide a mechanism through which NCUC meaningfully could enforce the requirement ‘that CP&L's retail native load customers receive priority with respect to, and the benefits from, CP&L's existing generation and that CP&L's wholesale activities not disadvantage its retail ratepayers from either a quality of service or rate perspective[.]’ ” and it could “ ‘take appropriate action . . . to secure and protect reliable service to retail customers in North Carolina.’ ” *Carolina Power & Light Co.*, 359 N.C. at 519-21, 614 S.E.2d at 284. As sections 62-30 and 62-32(b) of the North Carolina General Statutes give the Utility Commission “all powers necessary” to regulate public utilities to ensure the citizens of this State are provided with reasonable service, the instant regulation is authorized by sections 62-30 and 62-32(b) because the regulation's purpose is to ensure the supply of electricity to retail customers. Accordingly, we affirm the Utility Commission's orders as it has the statutory authority to require advance submission of wholesale contracts.

[4] Finally, Appellants argue that the Utility Commission erred by failing to provide guidance by which it would assess the reasonableness of the agreements. In its order denying reconsideration of its 10 July order, the Utility Commission stated that the “Order was only intended to address the matter of jurisdiction since that is a threshold

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issue. It is not appropriate for this Order to try to specify exactly how the Commission will exercise its jurisdiction or what the Commission might do in a particular case.” We hold that the Utility Commission was simply reserving this issue for later determination after the threshold issue of jurisdiction had been decided.

Appellants cite to section 62-79(a)(2) of the North Carolina General Statutes to support their argument that the Commission needed to give further guidance. Section 62-79(a)(2) provides:

(a) All final orders and decisions of the Commission shall be sufficient in detail *to enable the court on appeal to determine the controverted questions presented* in the proceedings and shall include:

(2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C. Gen. Stat. § 62-79(a) (2003) (emphasis added). The Commission’s order is sufficient to allow this Court to determine the issues of jurisdiction, i.e. violation of the commerce clause, supremacy of federal law, and statutory authorization, as previously stated. Accordingly, we affirm the Commission’s orders.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

The majority’s opinion addresses the issues of whether the regulation violates the Commerce Clause of the United States Constitution and Chapter 62 of the North Carolina General Statutes and affirms the Commission’s order without determining the effect of the regulation on interstate commerce. The record before us is insufficient to make that determination. This case should be remanded to the Commission. I respectfully dissent.

I. The Commerce Clause

Appellants contend the scope of the Commission’s jurisdiction over wholesale power contracts is an impermissible burden on inter-

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state commerce in violation of the Commerce Clause of the United States Constitution.

Article I, Section 8, Clause 3 of the United States Constitution confers on Congress the power to “regulate Commerce . . . among the several States[.]” The Commerce Clause “has long been seen as a limitation on state regulatory powers, as well as an affirmative grant of congressional authority.” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 133 L. Ed. 2d 796, 804 (1996) (citation omitted). The United States Supreme Court has “identified two modes of analysis to evaluate state statutes under the Commerce Clause. The Court will consider the statute invalid without further inquiry when it ‘directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests.’” *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 762-63, 131 L. Ed. 2d 820, 832-33 (1995) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 559 (1986)). Where a state statute regulates evenhandedly and only indirectly effects interstate commerce, “it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 178 (1970) (citation omitted). In either case, “the critical consideration is *the overall effect* of the statute on both local and interstate activity.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 560 (1986) (emphasis supplied).

It is established beyond peradventure that “legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality” A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Hodel v. Indiana, 452 U.S. 314, 323-24, 69 L. Ed. 2d 40, 50 (1981) (internal citations and quotations omitted).

The production and sale of electric energy is an article of trade within the bounds of Commerce Clause protection. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 71 L. Ed. 2d 188 (1982) (applying a Commerce Clause analysis to a regulation restricting the transportation of privately produced electricity in interstate

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commerce). “A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.” *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10-11, 73 L. Ed. 147, 153 (1928) (citations omitted).

Regulatory Condition 21 requires that an utility *shall not enter* into a contract for the wholesale purchase of electric energy at native load capacity without first giving the Commission and the Public Staff written notice twenty days prior to execution of the contract. The Commission’s justification for the prior submission requirement was to “provide a mechanism through which NCUC meaningfully could enforce the requirement ‘that CP&Ls retail native load customers receive priority with respect to, and the benefits from, CP&Ls existing generation and that CP&Ls wholesale activities not disadvantage its retail ratepayers from either a quality of service or rate perspective.’” *State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 359 N.C. 516, 519, 614 S.E.2d 281, 284 (2005). The Commission concluded it has the authority “to take appropriate action if necessary to secure and protect reliable service to retail customers in North Carolina.” The Commission failed to provide any guidelines by which it would assess the reasonableness of the agreements over which it has claimed jurisdiction. The Commission has not yet defined what constitutes “appropriate action,” or to set forth the factors it will use to determine whether the proposed “action” is “appropriate,” or what remedial measures the Commission may assert.

Without the Commission setting forth any guidelines it will follow in reviewing a wholesale contract, this Court is unable to determine the local and overall effects or benefits arising from the regulation to conduct a meaningful analysis under the Commerce Clause. *Brown-Forman Distillers Corp.*, 476 U.S. at 579, 90 L. Ed. 2d at 560 (the court must consider the overall effect of the statute on local and interstate activity). This Court cannot determine whether the burden on interstate commerce arising from the regulation “is clearly excessive” in relation to the local benefits it affords. *Pike*, 397 U.S. at 142, 25 L. Ed. 2d at 178.

The Commission has not issued any guidance to provide notice to or assist the parties in negotiating terms or provisions of contracts in advance of its required twenty-day prior submission of proposals. In *State ex rel. Util. Comm’n v. Carolina Water Service, Inc.*, our Supreme Court stated:

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This Court has stressed in the past how important it is that the Commission “enter final orders that are sufficient in detail to enable this Court on appeal to determine the controverted issues . . . *Failure to include all necessary findings of fact and details is an error of law and a basis for remand* under N.C.G.S. § 62-94(b)(4) *because it frustrates appellate review.*”

335 N.C. 493, 501-02, 439 S.E.2d 127, 132 (1994) (emphasis supplied) (quoting *State ex rel. Utilities Comm. v. AT&T Communications*, 321 N.C. 586, 588, 364 S.E.2d 386, 387 (1988)). I vote to remand this issue to the Commission for findings of fact and to develop a record setting forth the factors and guidelines the Commission will employ once it receives a proposed wholesale power contract and any constitutionally permissible “appropriate action” it may take.

II. Chapter 62

Appellants next contend that Chapter 62 of the North Carolina General Statutes does not authorize the Commission to require the submission of contracts with wholesale purchasers for regulation prior to execution. Our Supreme Court held that the Commission’s jurisdiction is not preempted by the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2.; *State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 359 N.C. at 529, 614 S.E.2d at 290.

The General Assembly has delegated to the Commission the “authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation” N.C. Gen. Stat. § 62-30 (2003). The Commission is also “vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service.” N.C. Gen. Stat. § 62-32(b) (2003).

The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly.

Utilities Comm. v. Coach and *Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 51, 132 S.E.2d 249, 254 (1963). Retail customers totally depend upon their franchised electric utility for reliable electric serv-

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ice. As such, the Commission has the duty to set reasonable rates and the authority to compel utility companies to render adequate and reliable service. *Utilities Comm. v. Edmisten*, 294 N.C. 598, 605, 242 S.E.2d 862, 867 (1978) (citation omitted). The Commission has asserted:

it has jurisdiction and authority under State law to review, before they are signed, proposed wholesale contracts by a regulated North Carolina public utility granting native load priority to be supplied from the same plant as retail ratepayers and to take appropriate action if necessary to secure and protect reliable service to retail customers in North Carolina.

The Commission presented no indication of or guidance to the parties through rule making or regulation how it intends to apply its asserted statutory authority to review a proposed interstate wholesale contract prior to its execution by the parties. The Commission has not set forth the options or powers it asserts to have upon reviewing these contracts or remedies it may assert, other than the power to “take appropriate action.”

Because the Commission failed to provide the parties any procedure or guidelines to show what the Commission will or will not do in light of a proposed contract, this Court is unable on this record to determine whether the regulation at issue is within the Commission’s statutory authority under Chapter 62.

In its order initiating the investigation and requesting comments, the Commission noted the “sharp disagreement among the parties” regarding the extent of the Commission’s jurisdiction. The Commission requested the parties file briefs arguing their positions on the extent of the Commission’s jurisdiction over regulated utilities signing wholesale interstate contracts at native load priority. The Commission also requested the parties submit a list of issues appropriate for further comment for review by the Commission.

As stated in the brief submitted by the North Carolina Attorney General, “the Commission has not failed to give the utilities specifics about how it intends to review and assess a grant of native load priority and its possible effects on retail customers. It simply has not gotten to that stage in this proceeding.” Because the Commission has not “gotten to that stage in this proceeding,” this Court is unable to review any guidelines or procedures the Commission may employ in reviewing a wholesale contract to determine the effect the

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Commission's actions may have on interstate commerce, or whether the regulation as applied on any "appropriate action" taken is an impermissible burden on interstate commerce.

Without guidance the utilities may rely upon in negotiating with potential interstate purchasers, public electric utilities doing business in North Carolina are left at a competitive disadvantage to electric utilities of other states. Without knowing the guidelines and procedures the Commission will employ in reviewing potential wholesale energy contracts, we are unable on this record to decide either the effects or burdens on interstate commerce or whether the Commission's prior review requirement or asserted "appropriate action" rests within its statutory powers.

I vote to remand this issue to the Commission for findings of fact and to develop a record setting forth the guidelines and procedures the Commission intends to employ upon the receipt and review of potential wholesale energy contracts and the nature and extent of the constitutionally permissible "appropriate action" it may take.

III. Conclusion

Without any guidelines or procedures the Commission intends to employ in reviewing a contract or the "appropriate action" it may take, this Court is unable to address the effect of the Commission's action on interstate commerce or to determine whether the Commission has acted within its statutory powers.

While the "purpose" of the prior review regulation may be laudable, our analysis must be on the "effect" on interstate commerce of the Commission's actions and whether the Commission's actions are permitted under its statutory powers. I agree with the State Attorney General's argument that the jurisdictional and preemption issues have been settled. This case should be remanded to the Commission for findings of fact and for developing a record consistent with the constitutional limits of the Commerce Clause, United States Constitution, Article I, Section 8, Clause 3, and its statutory powers under North Carolina General Statutes, Chapter 62. The attempt by the majority's opinion to adjudicate and affirm these issues in the absence of an adequate record and absence of the required Commerce Clause effects analysis is error. I respectfully dissent.

IN RE APPEAL OF WESTMORELAND-LG&E PARTNERS

[174 N.C. App. 692 (2005)]

IN THE MATTER OF THE APPEAL OF WESTMORELAND-LG&E PARTNERS FROM
THE DECISION OF THE HALIFAX COUNTY BOARD OF COMMISSIONERS FOR
THE TAX YEARS 1996-2001

No. COA04-1181

(Filed 6 December 2005)

1. Taxation-ad valorem— appeal of appraisals—standard

Ad valorem tax appraisals are presumed correct. To rebut this presumption, the taxpayer must show that an arbitrary or illegal method was used and that the assessment substantially exceeded the true value of the property.

2. Taxation— ad valorem—costs of preparing property for use

There was substantial evidence to support the Tax Commission's finding that the cost of a water treatment plant was necessary to prepare a taxpayer's electricity generating facilities for their intended use, despite the donation of the water treatment plant to a local town. The county's guidelines require it to tax all costs necessary to make personal property ready for its intended use; excluding this cost would result in assessment inequities with similar taxpayers.

3. Taxation— ad valorem—valuation—functional obsolescence

There was substantial evidence to support the Tax Commission's conclusion that a county properly considered the effect of functional obsolescence when assessing two coal-fired electrical generating plants. The circumstances of the taxpayer's business dealings do not impact the current functionality of the two facilities.

4. Taxation— ad valorem—valuation of electrical generating facilities—inclusion of power purchasing agreements

The proper market against which to judge the value of taxpayer's plants under the income approach includes power purchasing agreements (PPAs). The income under the PPAs is an essential part of the market for the taxpayer's property.

Appeal by defendant from decision entered 26 May 2004 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 20 April 2005.

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[174 N.C. App. 692 (2005)]

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker and Rebecca B. Joyner, for plaintiff-appellee.

Maupin Taylor, P.A., by Charles B. Neely, Jr., Nancy S. Rendleman and Kevin W. Benedict and Hatch, Little & Bunn, L.L.P., by Harold W. Berry, Jr. and A. Bartlett White, for defendant-appellant.

CALABRIA, Judge.

Westmoreland-LG&E Partners (“taxpayer”) appeals the final decision of the North Carolina Property Tax Commission (“Commission”) confirming the *ad valorem* tax valuation by Halifax County (“appellee”) of taxpayer’s business personal property (“personal property”). We affirm.

This appeal concerns the tax value of the Roanoke Valley Energy Facility (“ROVA”), which consists of two coal-fired generating facilities located in the Weldon Township of Halifax County, North Carolina. The first facility, ROVA I, has the capacity to generate 165 net megawatts of electricity from pulverized coal. It commenced commercial operations on 29 May 1994. The second facility, ROVA II, has the capacity to generate 44 net megawatts of electricity from pulverized coal, and it commenced commercial operation on 1 June 1995.

ROVA I and II operate as wholesale generators and sell their electricity to Virginia Power and Light Company (“VEPCO”) pursuant to two separate Power Purchasing and Operating Agreements (“PPAs”) entered into in January of 1989 and June of 1990. Under the PPAs, taxpayer agreed to build and operate the subject facilities and to supply VEPCO with electricity at a set price for twenty-five years from the respective commercial operations date, with possible extensions on each PPA of up to five years.

On 10 May 2001, the Halifax County Assessor implemented an audit program to verify the accuracy of personal property listings that were filed by businesses for the 1996 through 2001 tax years. An audit of taxpayer’s records for those years showed a variance between the capitalized cost of its personal property assets reported in taxpayer’s accounting records and the cost reported by taxpayer on its personal property listings that were filed with the county. Specifically, the discovery audit revealed taxpayer under-reported its personal property assets by approximately \$75 million each year. Based upon the audit, the Tax Administrator determined taxpayer did not properly list its

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business personal property and issued a discovery and appraisal as directed by N.C. Gen. Stat. § 105-312 (2003).

Appellee retained independent appraisers to assess the true value of taxpayer's facilities using both the cost approach and income approach methodology of valuation. Applying the cost approach method, the appraisers used the Cost Index and Depreciation Schedules promulgated by the North Carolina Department of Revenue to assess taxpayer's property. They considered, but made no adjustments for, functional or economic obsolescence. Under the income approach, the appraisers used the income projections based on the income earned under the PPAs, instead of the spot market prices for electric power for the years in question. Using these two approaches, the appraisers determined that the total true value of taxpayer's personal property was \$217,924,791 as of 1 January 1996; \$211,660,877 as of 1 January 1997; \$200,670,919 as of 1 January 1998; \$192,397,397 as of 1 January 1999; \$185,008,704 as of 1 January 2000; and \$176,580,042 as of 1 January 2001.

Subsequently, taxpayer hired Lawrence VanKirk ("VanKirk") and Glen Hartford ("Hartford") of Valuation Research to perform an appraisal of the value of taxpayer's personal property without referring to appellee's appraisal report. VanKirk and Hartford also used the cost and income approaches. However, under the income approach, VanKirk projected taxpayer's revenue for the subject property as consistently lower than the price actually received by taxpayer under the PPAs because VanKirk's revenue valuations were based on the spot market price for electric power for the 1996-2001 tax years. As a result, Hartford, analyzing the property's value under the cost approach, determined that there were insufficient earnings to support the calculated asset value of the property, and concluded that the property was subject to economic obsolescence. Additionally, Hartford found the property was subject to functional obsolescence because taxpayer needed to construct two electric generating plants capable of producing 209 megawatts at the same location rather than one plant capable of producing 209 megawatts. Based on this appraisal, Hartford and VanKirk concluded that the total true value of taxpayer's property was: \$124,400,000 as of 1 January 1996; \$123,000,000 as of 1 January 1997; \$117,000,000 as of 1 January 1998; \$116,000,000 as of 1 January 1999; \$108,000,000 as of 1 January 2000; and \$104,000,000 as of 1 January 2001.

On 26 May 2004, the Commission confirmed the appraiser's values and made the following pertinent findings of fact:

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6. During the 1996-2001 tax years at issue, the Halifax County business personal property listing forms provided, in pertinent part: "Property should be reported at 100% acquisition cost including installation, sales tax, freight and all other costs incurred with obtaining the property and making it ready for its intended use." For the years at issue, the Tax Administrator required all taxpayers to list 100% of the acquisition costs of their business personal property.

7. The taxpayer did not list 100% percent of the acquisition costs of the machinery and equipment and related business personal property situated in Halifax County even though it capitalized such costs for accounting and income tax purposes.

8. The discovery issued by the Tax Administrator was proper since the Taxpayer failed to list all costs associated with the acquisition of the assets, as well as the costs associated with bringing the assets into operation. The Tax Administrator then properly applied the North Carolina Department of Revenue Cost Index and Depreciation Schedules to these costs to determine the values of Taxpayer's Property[.]

Based on these findings of fact, the Commission also made the following pertinent conclusions of law:

6. The North Carolina Department of Revenue recommends that all costs associated with the acquisition of an asset, as well as the costs associated with bringing the property into operation, be included in the cost of an asset when listing the property for *ad valorem* tax purposes. These costs include direct and indirect costs, and may include, but are not limited to invoice cost, trade-in allowances, freight, installation costs, sales tax, expensed costs, and construction period interest.

7. [T]he Tax Administrator properly applied the Cost Index and Depreciation Schedules developed by the North Carolina Department of Revenue to those costs to reach the assessed values for the subject property.

8. Halifax County consistently applied this method of assessment to all taxpayers to reach the assessed values of their business personal property.

9. The Taxpayer did not produce competent, material and substantial evidence to show that Halifax County employed an arbitrary or illegal method of appraisal as to the subject property.

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10. The Taxpayer did not produce competent, material and substantial evidence to show that the values assigned to Taxpayer's personal property **substantially** exceeded the true values in money of the subject property. (Emphasis in original.)

11. The County Board's decision properly reflected the true values in money of the Taxpayer's personal property as of January 1, 1996, January 1, 1997, January 1, 1998, January 1, 1999, January 1, 2000, and January 1, 2000.

From this decision by the Commission, taxpayer appeals.

I. Standard of Review

[1] The standard of review for decisions of the Commission on appeal is set forth in N.C. Gen. Stat. § 105-345.2(b) (2003):

[T]he court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of any Constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

Appellate courts review all questions of law *de novo* and apply the "whole record" test where the evidence is conflicting to determine if the Property Tax Commission's decision has any rational basis. *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. 85, 88, 582 S.E.2d 645, 648 (2003). Under *de novo* review for decisions of the Property Tax Commission, the Court of Appeals considers the matter anew and freely substitutes its own judgment for

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that of the Commission. *In re Appeal of Church of Yahshua the Christ at Wilmington*, 160 N.C. App. 236, 238, 584 S.E.2d 827, 829 (2003). By way of comparison, under the “whole record test,” this Court may not replace the Commission’s judgment with its own judgment even if there are two reasonably conflicting views; rather, we merely determine whether an administrative decision has a rational basis in evidence. *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (1993). In so doing, we evaluate whether the Commission’s decision is “supported by substantial evidence, and, if it is, the decision cannot be overturned.” *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 165, 484 S.E.2d 450, 451 (1997). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

Our General Assembly requires appraisals for all property in this State for *ad valorem* taxation purposes at the property’s “true value in money” or market value as far as practicable. N.C. Gen. Stat. § 105-283 (2003). It is well-settled in this State that *ad valorem* tax assessments are presumed correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). In order to rebut this presumption, the taxpayer must present competent, material, and substantial evidence that tends to show (1) either the county tax supervisor used an arbitrary or illegal method of valuation and (2) the assessment substantially exceeded the true value in money of the property. *Id.*, 287 N.C. at 563, 215 S.E.2d at 762. It is not enough for the taxpayer to merely show that the method used by the county tax supervisor was wrong; the taxpayer must additionally show that the result of the valuation is substantially greater than the true value in money of the property assessed. *Id.*

II. Arbitrariness or Illegality of Assessment

In its first assignment of error, taxpayer asserts the Commission erred in concluding that taxpayer did not produce competent, material, and substantial evidence that the County’s method of appraisal was arbitrary or illegal. Specifically, taxpayer argues that the County’s assessment was arbitrary and illegal in that it (a) included the cost of a water treatment plant taxpayer built but later deeded to the Town of Weldon; (b) failed to take into account functional obsolescence; (c) failed to take into account economic obsolescence; and (d) failed to consider the income approach in valuating the property.

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A. The Water Treatment Plant

[2] Taxpayer first argues that the County's discovery was arbitrary and illegal because the assessment included the cost of a \$5 million water treatment plant that taxpayer built but later transferred to the Town of Weldon. We disagree.

Under N.C. Gen. Stat. § 105-291 (2003), the Department of Revenue has the power to (1) "prescribe the forms, books, and records to be used in the listing, appraisal, and assessment of property and in the levying and collection of property taxes, and how the same shall be kept" and (2) "develop and recommend standards and rules to be used by tax supervisors and other responsible officials in the appraisal of specific kinds and categories of property for taxation." As permitted by Department of Revenue regulations, the Halifax County guidelines provide that the acquisition cost of property includes "installation, sales tax, freight, and *all other costs* incurred with obtaining the property and making it ready for its intended use." It follows that the acquisition cost determination in the instant case must include any amount spent in order to make taxpayer's personal property ready for use.

In the instant case, the County is not assessing taxpayer directly as the owner of the water treatment plant but is, instead, assessing the treatment plant's costs as part of the acquisition and development costs associated with the ROVA I and II facilities pursuant to its guidelines. Bruce Holden, the vice-president of Westmoreland, testified that appellant considered the building of the water treatment plant a development cost and if the plant had not been built, Westmoreland would have had huge capacity restraints in the future. Thomas Tinker, a County appraiser, also testified the water treatment plant was required for the facilities to be operational and that, absent the arrangement with the Town of Weldon, taxpayer would have been required to build the water treatment plant itself. The taxpayer also listed the cost of the water plant as an asset on its books and capitalized the cost each year on its federal tax returns, further indicating taxpayer treated the construction of the water plant as an indirect cost when building its facilities. Thus, there is competent evidence that the water plant's cost was incurred to make the boilers and other machinery ready for use. Since the County's guidelines require it to tax all costs necessary to make personal property ready for its intended use, excluding this type of cost in the instant case would result in assessment inequities when compared to what is required of similar taxpayers in Halifax County. Accordingly, as there is substan-

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tial evidence to support the Commission's finding that the cost of the water treatment plant was necessary to make taxpayer's property ready for its intended use, such cost was properly included in the County's discovery assessment.

B. Functional Obsolescence

[3] Taxpayer next asserts the County's assessment was illegal and arbitrary because it failed to take into account functional obsolescence when using the cost approach method of valuating its personal property. Specifically, taxpayer argues the assessment should have factored in functional obsolescence based on the fact that the construction of one larger plant producing 209 kilowatts would have been less expensive than building two smaller plants during the years assessed. We disagree.

Part of the cost approach is deducting for depreciation, which is "a loss of utility and, hence, value from any cause . . . the difference between cost new on the date of appraisal and present market value." Depreciation may be caused by deterioration, which is a physical impairment, such as structural defects, or by obsolescence, which is "an impairment of desirability or usefulness brought about by changes in design standards (functional obsolescence) or factors external to the property (economic obsolescence)."

In re Appeal of Stroh Brewery, 116 N.C. App. 178, 186, 447 S.E.2d 803, 807 (1994). The *Business Personal Appraisal Manual* published by the North Carolina Department of Revenue's *Ad Valorem* Tax Division defines functional obsolescence as a "loss in value due to impairment of functional capacity . . . inherent in the property itself." North Carolina Dept. of Revenue *Ad Valorem* Tax Division, *Business Personal Property Appraisal Manual*, 7-17 (1995). These factors include overcapacity, inadequacy or changes in the state of the art, or poor design. *Id.*

Taxpayer's argument does not speak to any technological or design factors inherent in the ROVA I or II facilities that impair the property's desirability or usefulness. Its argument merely states that, if it had been aware of all the additional contracts, it could have saved money by tooling once to meet those contracts rather than tooling twice. However, the circumstances of taxpayer's business dealings does not impact the current functionality of the two facilities. The record indicates both plants have outstanding performance records, operate above industry standards in production, have no environ-

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mental problems, and have been consistently profitable. Based on these factors and the possible benefits to having two facilities instead of one, Tinker rejected the argument that taxpayer's personal property was functionally obsolescent. Although taxpayer presented evidence to the contrary, there is substantial evidence to support the Commission's conclusion that the County properly considered the effect of functional obsolescence.

Moreover, taxpayer failed to offer competent, material, and substantial evidence that any error in assessing functional obsolescence resulted in the amount of the County's assessment substantially exceeding the true value of its property. The assessment offered into evidence by taxpayer's expert failed to analyze what effect building one coal plant instead of two would have on the tax valuation. Instead, the assessment dealt with calculating a functional obsolescence penalty based on the cost of replacing taxpayer's coal burning facility with a gas powered facility. Taxpayer's expert testified at the hearing that, even absent the functional obsolescence penalty he assigned in his assessment, there "[wa]s a functional penalty alone in the pulverized coal facility as a pulverized coal facility, because . . . in essence, one facility would have cost *perhaps* \$20-30 million less[.]" This qualified and speculative statement, standing alone and unsupported by independent research, does not constitute substantial evidence to establish there has been an overvaluation of taxpayer's property. Accordingly, we find the Commission properly considered the evidence on functional obsolescence and find no error.

C. Economic Obsolescence

[4] Taxpayer next argues the County's discovery assessment failed to take into account economic obsolescence when valuing taxpayer's personal property, rendering the assessment arbitrary and illegal. Specifically, taxpayer asserts the County's income approach erroneously relied solely on the income projections under the PPAs instead of looking at the spot market prices at the time of the assessment dates. Taxpayer contends that this failure to study the spot market price for electricity gave the County "no basis to determine the existence of economic obsolescence and correctly complete its cost approach valuation."

In *In re Appeal of Belk-Broome*, 119 N.C. App. 470, 458 S.E.2d 921 (1995), this Court reviewed the Commission's decision to uphold a tax valuation assigned to one of three anchor department stores at a mall. We observed that a mall developer must first secure anchor

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department stores prior to construction in order to attract both customers and tenant stores and, thereby, make the mall viable. *Id.*, 119 N.C. App. 475, 458 S.E.2d at 925. Accordingly, the operating agreement between the mall developer and the anchor store, which defines each party's respective rights and obligations, customarily offered anchor stores lower rental rates and purchase prices in exchange for the anchor store's promise "to operate only as a department store and . . . not to sell the property to any entity other than an acceptable anchor department store." *Id.*, 119 N.C. App. at 476, 458 S.E.2d at 925. In finding error in the County assessor's valuation, we noted that he considered solely the normal market rents and failed to consider the specific operating agreement of the taxpayer anchor store, which was the market standard. *Id.*, 119 N.C. App. at 476, 458 S.E.2d at 925. This Court further observed that the operating agreement in *Belk-Broome* was "an integral part" of the market; therefore, "[t]he property must be valued according to that market." *Id.*, 119 N.C. App. at 478, 458 S.E.2d at 926. "Placing a lower value on th[e] property solely because it is an anchor store may appear illogical, but this unequal treatment is a part of the market that must be considered." *Id.*¹

In the present case, taxpayer owns two coal powered plants and a PPA guaranteeing for 25 years an income that exceeds the income obtainable absent the contract. The evidence in the instant case shows that large electric power plants constructed during the early 1990's were built and financed on the basis of the PPAs. In fact, testimony indicated taxpayer would not have been able to obtain construction financing for these facilities unless the PPA had been negotiated and executed. Taxpayer's own witness, Chris Ganley, the senior manager at LG&E, acknowledged that taxpayer's plant could not operate in the spot market and that without the PPAs their facilities would shut down. He further testified that in a recent attempt to sell the facilities, the income projections given to the buyer were based on the revenues received under the PPAs, indicating that the PPAs

1. Taxpayer's reliance, therefore, upon cases such as *In re Southern Railway*, 313 N.C. 177, 328 S.E.2d 235 (1985), *In re Appeal of Greensboro Office Partnership*, 72 N.C. App. 635, 325 S.E.2d 24 (1985), *rev. denied*, 313 N.C. 602, 330 S.E.2d 610 (1985), and *In re Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E.2d 855 (1963), is misplaced. These cases establish that, for purposes of N.C. Gen. Stat. § 105-283, property should be valued at market value or "the price . . . at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used[.]" As distinguished by *Belk-Broome*, where an operating agreement is a market standard such that it affects the price a willing buyer would pay a willing seller, it is appropriate to consider the terms of such agreement.

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were included in any transfer of taxpayer's personal property. Taxpayer's argument, that its income must be determined based on spot market prices, ignores the necessity for taxpayer to negotiate the PPA and fix its income stream for the period in question. Like the operating agreement in *Belk-Broome*, the income received under the PPAs are an integral part of the market for taxpayer's property; therefore, any assessment of this property's income must factor in the revenue streams received under these PPAs. The existence of the PPA is not something unique to this facility but was a market standard during the tax years in question. Accordingly, the proper market against which to judge the value of taxpayer's plants under the income approach is that consisting of the existing facilities with the PPAs, and taxpayer's argument that the County's cost approach failed to factor in economic obsolescence is rejected.

D. Failure to Consider the Income Approach

Taxpayer next asserts the failure by the County to consider the income approach renders the County's discovery assessment arbitrary and illegal. However, this argument is based on the assumption that the County's assessment under the income approach was improper. Having concluded that the County correctly valued taxpayer's personal property under the income approach, we need not address this contention.

III. Taxpayer's Remaining Arguments

Finally, taxpayer contends the assessed value of taxpayer's personal property substantially exceeded the property's true value and that the Commission failed to shift the burden of proof to the County after taxpayer presented its evidence. However, we do not reach these assignments of error, as taxpayer has failed to meet its initial burden of presenting material, competent, and substantial evidence that the tax valuation was arbitrary and illegal.

Affirmed.

Judges McGEE and ELMORE concur.

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LISA KARGER, PLAINTIFF v. RICHARD KELVIN WOOD, DEFENDANT

No. COA05-251

(Filed 6 December 2005)

1. Child Support, Custody, and Visitation— custody—substantial change in circumstances

The trial court did not err by denying defendant's motion for involuntary dismissal in a child custody case even though he contends the evidence failed to establish a substantial change of circumstances affecting the welfare of the minor child, because plaintiff presented sufficient evidence to withstand defendant's N.C.G.S. § 1A-1, Rule 41(b) motion.

2. Child Support, Custody, and Visitation— custody—substantial change in circumstances—effect on child's welfare

The trial court did not err in its order changing child custody by failing to include a specific conclusion that the change of circumstances "affected the welfare of the child," where: (1) the trial court laid out in sequential order the facts regarding defendant's relationship with a married woman resulting in the resignation from his job and culminating in his separation from his wife who provided at least 50% of the minor child's care including helping the child with his homework; (2) the trial court then found that the child's grades had suffered, thus providing the nexus between the substantial change in circumstances and the affect on the child's welfare; (3) the findings describe the stable environment plaintiff can now provide; and (4) the court's conclusion that changed circumstances occurred "such as justifies modification of the previous orders as set forth hereinafter and said modification would be in the best interests of the minor child" is an implicit conclusion that the change in circumstances affected the welfare of the child.

3. Child Support, Custody, and Visitation— custody—modification

The trial court did not err in a child custody case by modifying its previous custody order and awarding plaintiff primary custody.

Judge TYSON concurring in part and dissenting in part.

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Appeal by defendant from order entered 3 September 2004 by Judge Jimmy L. Love, Jr., in Harnett County District Court. Heard in the Court of Appeals 21 September 2005.

James R. Levinson for plaintiff-appellee.

O. Henry Willis, Jr., P.A., by O. Henry Willis, Jr., for defendant-appellant.

STEELMAN, Judge.

Defendant, Richard Kelvin Wood, appeals the trial court's order awarding custody of the minor child, R.T.K.W., to plaintiff, Lisa Karger. For the reasons discussed herein, we affirm.

I. Background

The parties are the parents of R.T.K.W., who was born on 20 March 1997. Shortly after the child's birth, plaintiff was diagnosed with a brain tumor. Plaintiff underwent surgery to remove the tumor, however, its removal caused plaintiff to be incapacitated, unable to walk, and unable to work for a period of time. On 16 December 1997, the trial court entered a temporary order awarding primary physical custody of the child to defendant and granting plaintiff supervised visitation. As plaintiff's medical condition improved, she filed motions to modify custody. On 9 September 1998, the trial court entered a temporary order continuing physical custody with defendant and allowing plaintiff supervised visitation. On 13 September 2000, the trial judge entered a custody order awarding defendant custody of the child and granting plaintiff increased unsupervised visitation.

On 19 July 2004, plaintiff filed another motion seeking custody of the minor child. Plaintiff alleged that certain changes in circumstance existed sufficient to modify custody, including the following: (1) she continues to recover from her tumor and seizure activity, which affected her in 1997; (2) medical personnel have verified that her condition has improved so that she could resume full custody of her child; (3) she has a stable residence; (4) defendant is now separated from his third wife who was the primary caretaker for the child; and (5) defendant is cohabiting with a married woman in the presence of the child although he is still married to his third wife.

The trial court held a hearing on plaintiff's motion on 24 August 2004. At the close of plaintiff's evidence, defendant moved for dismissal of plaintiff's motion pursuant to Rule 41(b) of the Rules of

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Civil Procedure, asserting plaintiff's evidence failed to establish a substantial change of circumstances affecting the welfare of the child. The trial court denied the motion. Defendant renewed his motion to dismiss at the close of all the evidence. The trial court also denied this motion. The judge then entered an order containing findings of fact and conclusions of law, and determined that a substantial change in circumstances had occurred since the 13 September 2000 custody order. As a result, the trial court awarded plaintiff primary physical custody of the minor child, with the parties having joint legal custody. Defendant appeals.

II. Issues

The issues defendant raises on appeal are whether the trial court erred: (1) in denying defendant's motions for involuntary dismissal where the evidence failed to establish a substantial change of circumstances affecting the welfare of the minor child; (2) in failing to conclude that the change in circumstances affected the welfare of the child; and (3) modifying a previous custody order and awarding plaintiff primary custody where the order was not supported by adequate or proper conclusions of law.

III. Substantial Change in Circumstances

A. Standard of Review

The trial court has the authority to modify a prior custody order when a substantial change in circumstances has occurred, which affects the child's welfare. *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003). The party moving for modification bears the burden of demonstrating that such a change has occurred. *Id.* The trial court's order modifying a previous custody order must contain findings of fact, which are supported by substantial, competent evidence. *Id.* at 474, 586 S.E.2d at 253. "[T]he trial court is vested with broad discretion in cases involving child custody," and its decision will not be reversed on appeal absent a clear showing of abuse of discretion. *Pulliam v. Smith*, 348 N.C. 616, 624-25, 501 S.E.2d 898, 902 (1998). In determining whether a substantial change in circumstances has occurred:

[C]ourts must consider and weigh all evidence of changed circumstances which effect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects

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upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Id. at 619, 501 S.E.2d at 899.

B. Motions for Involuntary Dismissal

[1] Defendant contends the trial court erred by denying his motions for involuntary dismissal made at the close of plaintiff's evidence and renewed at the close of all the evidence. He argues the evidence presented failed to show a substantial change in circumstances affecting the welfare of the child. We disagree.

We note that by presenting evidence, defendant waived his right to appeal the denial of his motion to dismiss made at the close of plaintiff's evidence. *Hamilton v. Hamilton*, 93 N.C. App. 639, 642, 379 S.E.2d 93, 94 (1989). Therefore, we only review the trial court's denial of his motion to dismiss made at the close of all the evidence.

Rule 41(b) of the North Carolina Rules of Civil Procedure provides in pertinent part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2005). A Rule 41(b) motion is properly granted where the plaintiff has "shown no right to relief or . . . has made out a colorable claim but the court nevertheless determines as the trier of fact that the [defendant] is entitled to judgment on the merits." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 909 (2001).

When a motion to dismiss pursuant to Rule 41(b) is made, the judge becomes both the judge and the jury; he must consider and weigh all competent evidence before him; and he passes upon the credibility of the witnesses and the weight to be given to their testimony. In the absence of a valid objection, the court's findings of fact are presumed to be supported by competent evidence, and are binding on appeal.

Miles v. Carolina Forest Ass'n, 167 N.C. App. 28, 34-35, 604 S.E.2d 327, 332 (2004) (internal citations omitted).

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Plaintiff presented evidence of and the trial court found as facts:

8. That since the time of the previous Order, the defendant began a relationship with a married woman, Bessie Lippmann.

9. That as a result of the above relationship, the defendant was given the option of being terminated or resigning from his job, which he did.

10. That as a result of the above relationship, the defendant and his wife, Susan Wood separated and have been separated for the past year, although there are no separation papers signed.

11. At the time of and since the previous Order, Susan Wood provided at least 50% of the care for the minor child, including getting him up, taking him to school, picking him up from school and helping with his homework.

12. That the defendant is now employed at the Contractor Yard Monday through Friday from 7:00 a.m. until 5:00 p.m. with the result that he must take the minor child to school by 7:00 a.m. and is unable to pick him up from school until between 5:00 and 5:45 p.m. even though normal school hours are 8:20 a.m until 3:00 p.m.

13. That in the past year, the minor child's grades have suffered, ranging from F's to B-, at Raleigh Christian Academy although the child was promoted.

14. That the defendant has visitation with his thirteen year old daughter, forty miles away, on Wednesdays from 5:00 until 7:00 p.m. and either took the minor child with him or left him with relatives before picking him back up to return home to do homework.

15. That for the past year, the defendant and the minor child have on occasion spent the night at Bessie Lippmann's house and Bessie Lippmann has spent the night on occasion at the defendant's house when the minor child was present.

16. That the plaintiff originally had restricted visitation and lost custody because of a brain tumor she suffered. That the plaintiff's medical condition has substantially improved since the previous Order and now stabilized so that she is no longer receiving treatment and goes in once a year for a medical check. Plaintiff has a valid driver's license and can drive.

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17. The plaintiff is now employed from 10:00 a.m. until 2:00 p.m. three days a week at Stock Building Supply so she can personally take the minor child to school and pick him up on time.

After careful review, we conclude that plaintiff presented sufficient evidence to withstand defendant's Rule 41(b) motion to dismiss regarding the issue of whether a substantial change in circumstances had occurred. This assignment of error is without merit.

C. Conclusions of Law: Change Affecting the Welfare of the Child

[2] Defendant next argues the trial court erred in failing to conclude that the change of circumstances affected the welfare of the child. We disagree.

Based on its findings of fact, the trial court made the following conclusions of law concerning how the changes affected the child.

3. There has occurred since the entry of the Order entered herein September 13, 2000 a substantial change in circumstances of the parties and the minor child such as justifies modification of the previous Order so as to award custody of the minor child to the plaintiff and plaintiff's Motion to transfer custody of the minor child to her should be granted.

4. There has occurred since the entry of September 13, 2000 a change in circumstances such as justifies modification of the previous orders as set forth hereinafter and said modification would be in the best interest of the minor child.

As we stated previously, a trial court's modification of custody will be upheld if its findings are supported by substantial evidence. *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902. Where the trial court concludes that a substantial change in circumstances has occurred affecting the welfare of the child and that custody modification was in the best interest of the child, we defer to the trial court's judgment, and will not overturn it, absent a clear showing of abuse of discretion. *Id.* at 625, 501 S.E.2d at 902; *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254.

In addition to the facts recited above, the trial court also made these findings of fact:

6. An Order was thereafter entered on September 13, 2000 giving defendant custody and plaintiff increased visitation. Both parties are fit and proper persons to have custody.

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18. The plaintiff has a three bedroom house in Benson, in a good neighborhood, and surrounded by neighbors with children who are the same age of and know the minor child. These neighbors include professional people and teachers. Plaintiff and the minor child attend church regularly. The defendant does not take the minor child to church.

20. A substantial change of circumstances that effects [sic] the minor child has occurred since the September 13, 2000 Order and it is in the best interests of the minor child that the Court's order be modified.

As discussed above, the trial court found a number of substantial changes in circumstance, which were sufficient to withstand defendant's motion to dismiss. The trial court further concluded "[t]here has occurred since the entry of September 13, 2000 [sic] a change in circumstances such as justifies modification of the previous orders as set forth hereinafter and said modification would be in the best interests of the minor child." It is implicit in this conclusion that the change in circumstances affected the welfare of the child, and thus, supported the change in custody. Just because the trial court did not use the exact phrase "affecting the welfare of the child" should not be determinative. Such an application would place form over substance. When determining whether the findings are adequate, this Court examines the entire order. *See Carlton v. Carlton*, 145 N.C. App. 252, 263, 549 S.E.2d 916, 924 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L. Ed. 2d 811 (2002) (noting the findings included within the order appealed from, considered together with the findings from a previous order, and "taken as a whole" sufficiently demonstrated the connection between the change in circumstances and the welfare of the child). The trial court is not constrained to using "certain and specific 'buzz' words or phrases" in its order. *Id.*

Here, the trial court carefully laid out in sequential order the facts regarding defendant's relationship with a married woman, resulting in him resigning from his job, and culminating in his separation from his wife who provided at least 50% of the minor child's care, including helping the child with his homework. The trial court then found that the child's grades had suffered, thus providing the nexus between the substantial change in circumstances and the affect on the child's welfare. The findings go on to describe the stable environment plaintiff can now provide. More importantly, the court's last finding specifically states that "[a] substantial change of circumstances that

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[a]ffects the minor child has occurred since the September 13, 2000 Order[.]” (emphasis added). We do not construe the order as narrowly as appellant suggests. Rather, we find that the findings of fact and conclusions of law support the trial court’s order. This argument is without merit.

D. Conclusions of Law: Sufficient to Modify Previous Order

[3] Finally, defendant contends the trial court erred in modifying its previous custody order and awarding plaintiff primary custody where the order was not supported by adequate or proper conclusions of law. For the reasons discussed above, this argument is without merit.

IV. Conclusion

For the reasons discussed herein, we affirm the trial court.

AFFIRMED.

Judge HUNTER concurs.

Judge TYSON concurs in part and dissents in part in a separate opinion.

TYSON, Judge, concurring in part and dissenting in part.

I concur with the majority’s opinion to uphold the trial court’s denial of defendant’s motions to dismiss. I respectfully dissent from that portion of the majority’s opinion which holds the trial court properly found a change of circumstances affecting the welfare of the child. The trial court failed to make sufficient findings regarding the effect of the changed circumstances on the child’s welfare.

I. Substantial Change in Circumstances

A. Standard of Review

In *Blackley v. Blackley*, our Supreme Court stated the plaintiff’s burden of proof to support a modification of a child custody order. 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

The entry of an Order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child’s welfare is properly established, the Court may modify

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prior custody decrees. However, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and *the party moving for such modification assumes the burden of showing such change of circumstances.*

Id. (internal citations omitted) (emphasis supplied).

In *Puliam v. Smith*, our Supreme Court broadened the trial court's discretion in determining whether a substantial change of circumstances had occurred. 348 N.C. 616, 620, 501 S.E.2d 898, 899 (1998).

[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Id.

B. Conclusions of Law

Based on its findings of fact, the trial court concluded:

3. There has occurred since the entry of the Order entered herein September 13, 2000 a substantial change in circumstances of the parties and the minor child such as justifies modification of the previous Order so as to award custody of the minor child to the plaintiff and plaintiff's Motion to transfer custody of the minor child to her should be granted.

4. There has occurred since the entry of September 13, 2000 a change in circumstances such as justifies modification of the previous orders as set forth hereinafter and said modification would be in the best interest of the minor child.

We review the trial court's conclusions of law *de novo*. *Scott v. Scott*, 157 N.C. App. 382, 385, 579 S.E.2d 431, 433 (2003) (citation omitted).

Here, the trial court failed to make any finding of fact regarding any effect the change of circumstances may have had on the welfare of the child. In finding of fact Number 15, the trial court states that defendant and the child spent the night at Bessie Lippmann's house,

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and Bessie Lippmann spent the night at defendant's house when the child was present. The trial court made no findings of fact of any effect defendant's behavior or presence with Bessie Lippmann may have had on the child and did not find any inappropriate behavior between defendant and Lippmann on these occasions. "The fact that the [child was] present . . . cannot be construed as a finding that the [child's] welfare was affected." *Browning v. Helff*, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000).

The trial court also found in finding Number 13 that the child's grades had suffered in the past year. However, no finding of fact was made that the grades the child earned resulted from any substantial change of or due to the conduct circumstances of either of the parties.

The trial court made other findings of fact regarding plaintiff's housing situation, plaintiff's improved medical condition, the parties' employment, defendant's separation from Susan Wood, and defendant's visitation with his daughter. The trial court failed to indicate the effect that any of these changes had on the welfare of the child. The trial court is not constrained to using "certain and specific 'buzz' words or phrases" in its order. *Carlton v. Carlton*, 145 N.C. App. 252, 263, 549 S.E.2d 916, 924 (Tyson, J., dissenting), *rev'd per curiam*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L. Ed. 2d 811 (2002).

The facts here can easily be distinguished from *Carlton*. In *Carlton*, the trial court's findings of fact clearly indicated how the changed circumstances affected the welfare of the minor child, Angela. 145 N.C. App. at 263, 549 S.E.2d at 924. The trial court's findings of fact clearly stated:

(1) that plaintiff's absconding with the child caused Angela to miss 38 days of school, furthering her failure to maintain her school work and requiring that she obtain additional help from her teacher and defendant to make up school work caused by the absences; and (2) that the effect on Angela of a move to Hawaii and the awarding of primary custody and residence of Angela to one parent would provide needed stability in the child's life.

Id. While the trial court is not required to use certain words or phrases to show an effect in its order, "the evidence must demonstrate a *connection between the substantial change in circumstances and the welfare of the child*, and flowing from that prerequisite

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site is the requirement that the trial court make *findings of fact regarding that connection*.” *Shipman v. Shipman*, 357 N.C. 471, 478, 586 S.E.2d 250, 255 (2003) (citation omitted) (emphasis supplied). It is not the province of this Court on appeal to infer a connection the trial court expressly failed to find or make.

Here, “the trial court only partially discharged its duty in finding that a change in circumstances occurred without also finding whether plaintiff had met her burden of showing the effect, if any, of such change upon the welfare of the [child].” *Browning*, 136 N.C. App. at 425, 524 S.E.2d at 99. The trial court failed to find or conclude how defendant’s relationship with Bessie Lippmann, defendant’s separation from Susan Wood, defendant’s new job, defendant’s visitation with his daughter, plaintiff’s housing situation, and plaintiff’s improved medical condition affect the welfare of the child. Without making such determination, the trial court failed to “demonstrate a connection between the substantial change of circumstances and the welfare of the child” to take custody from defendant and award custody to plaintiff. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255.

II. Conclusion

The trial court failed to find whether plaintiff had met her burden of showing what effect, if any, the change of circumstances had on the welfare of the child. Accordingly, I vote to vacate the trial court’s order and remand for determination of how the change of circumstances affected the child’s best interests and welfare.

Contrary to the trial court’s conclusions that the custody order is a “final order,” custody orders are never final and are always subject to modification upon a requisite showing of a substantial change of circumstances affecting the welfare of the child. *In re R.T.W.*, 359 N.C. 539, 545, 614 S.E.2d 489, 493 (2005). On remand, the trial court should also consider any additional evidence of changed circumstances that have occurred since the date the order was entered. I respectfully dissent.

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STEPHAN J. WILLEN AND ELIZABETH F. WILLEN, PLAINTIFFS V.
SUSANNAH L. HEWSON, DEFENDANT

No. COA05-81

(Filed 6 December 2005)

1. Fraud— trespass and vandalism problem on property—reasonable reliance upon representations

The trial court did not err by concluding that defendant committed fraud even though defendant contends plaintiffs failed to demonstrate that they were denied the opportunity to investigate the pertinent property or that they could not have discovered the trespass and vandalism problem through the exercise of due diligence, because: (1) even if there is no duty to disclose information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses; (2) plaintiffs reasonably relied upon defendant's representations that the property was peaceful and serene and that it did not suffer from trespass problems; (3) when plaintiffs specifically inquired of defendant regarding a potential trespass problem, she denied that such problem existed although she had full knowledge of the severity of the trespass and vandalism problem at the property; (4) the trespass problem was a material fact which defendant deliberately concealed in order to realize a substantial profit on the sale of her property; and (5) plaintiffs would not have purchased the property had they known of the trespass and vandalism problem.

2. Unfair Trade Practices— fraud—sale of property

The trial court did not err by concluding that defendant's actions of representing that the pertinent property was peaceful and serene and that it did not suffer from trespass problems constituted unfair and deceptive trade practices, because: (1) proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts and the burden shifts to defendant to prove he is exempt from the provisions of N.C.G.S. § 75-1.1; (2) defendant was not engaged in the sale of her own residence; and (3) defendant was motivated by the potential for profit, and she received actual gross profit of \$253,165 from her conduct.

3. Costs— attorney fees—no showing of abuse of discretion

Although defendant contends the trial court abused its discretion in awarding attorney fees in a fraud and unfair and decep-

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tive trade practices case, this assignment of error is overruled because there is no evidence of an abuse of discretion by the trial court and the trial court made all of the necessary findings to support its award of attorney fees.

4. Costs— attorney fees—appeal

Although the trial court did not abuse its discretion by failing to award more than \$55,000 in attorney fees for the trial of a fraud and unfair and deceptive trade practices case, the case is remanded for a determination of the hours spent on appeal, for a reasonable hourly rate, and for the entry of an appropriate attorney fee award. Plaintiffs are entitled to attorney fees on appeal since plaintiffs were entitled to attorney fees for hours expended at the trial level.

Appeal by defendant and plaintiffs from judgment entered 17 June 2004, and appeal by defendant from an order entered 25 June 2004 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2005.

Bishop, Capitano & Moss, P.A., by A. Todd Capitano; Robinson, Bradshaw & Hinson, P.A., by A. Ward McKeithen, for plaintiff-appellants.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant.

HUNTER, Judge.

Susannah Hewson (“defendant”) appeals from a judgment and an order of the trial court awarding \$322,753.59 to Stephan Willen (“Stephan”) and Elizabeth Willen (collectively “plaintiffs”) on their claims against defendant for fraud and unfair and deceptive practices, and from the trial court’s granting of attorneys’ fees in the amount of \$55,000.00 and costs in the amount of \$3,284.18. Defendant contends on appeal the trial court erred in concluding that she committed fraud or unfair and deceptive practices. Plaintiffs also appeal, arguing the trial court failed to award appropriate attorneys’ fees. For the reasons stated herein, we affirm the judgment and order of the trial court.

Plaintiffs presented evidence at trial tending to show the following, as found by the trial court: On or about 2 May 2000, plaintiffs read an advertising circular featuring for sale property owned by defendant in Mecklenburg County, North Carolina. Plaintiffs subsequently

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viewed the property, an estate of approximately twenty-two acres of land with a large house, known as “Deverill,” and received marketing material advertising Deverill as “peaceful” and “serene.” Plaintiffs subsequently met with defendant at Deverill and informed her of their desire to have a rural setting in which to raise their four small children. Defendant had been raised at Deverill and had resided on property adjacent to Deverill for more than forty years. Defendant had purchased Deverill only two months earlier at a partition proceeding for \$685,000.00. She informed plaintiffs that Deverill was suitable for raising children and told them stories of her own upbringing on the property to encourage their belief as to the property’s suitability. Defendant never informed plaintiffs that Deverill was not, in fact, peaceful or serene.

In reliance upon defendant’s representations concerning Deverill, including her description of the property as peaceful and serene, plaintiffs executed two purchase agreements with defendant: One for the house and surrounding eight acres at a purchase price of \$700,000.00, and the other for the remaining approximately fourteen acres at a purchase price of \$238,165.00. The contracts provided that plaintiffs would be excused from closing on the property if they were unable to sell their existing residence by 30 August 2000. The contracts also provided plaintiffs the right to inspect the property and to walk away from the transaction.

During an inspection of the property on 1 July 2000, plaintiffs encountered defendant’s niece, Sherry Langevin (“Langevin”). Langevin had resided on property adjacent to Deverill since 1987. During their conversation, Langevin mentioned that there had been problems with “kids coming onto the property after high school football games around Halloween.” Stephan subsequently telephoned defendant and specifically inquired whether Deverill suffered from a trespass problem. Defendant denied any trespass problem existed, and stated that such incidents had only happened once or twice. Defendant told Stephan that Langevin often exaggerated, and that her statement about the trespassing was one such example.

Plaintiffs were unable to sell their home by 30 August 2000. They did not elect to terminate their contract, however, as was their right, and eventually closed on the purchase of Deverill on 29 September 2000.

Shortly after moving into their new home, plaintiffs discovered that Deverill suffered from a material, long-standing, and year-round

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problem with trespass and vandalism. Over the ensuing two years, plaintiffs experienced frequent incidents of trespass and vandalism. Plaintiffs lost numerous items of personal property due to theft, suffered suspected arson at one of their buildings, were verbally accosted in their own yard, and had windows and lights shot out with guns. Stephan was physically assaulted. These incidents caused plaintiffs to develop a “siege mentality” which materially altered their lifestyle. In response to the trespass and vandalism problems, plaintiffs installed a new gate at the entrance of their driveway, a home security system, and a security fence around a portion of the perimeter of their home. For cost reasons, plaintiffs did not fully encircle their home or the entire twenty-two acres of property. The security measures taken by plaintiffs, however, failed to eliminate the trespass and vandalism problems.

Stephan wrote to defendant in March 2001 concerning her failure to inform plaintiffs of the trespass problems associated with Deverill and asked that she participate in appropriate security measures. Defendant responded to the letter by having her attorney meet with Stephan, through whom defendant denied knowledge of the problem and informed him that the rule of *caveat emptor* absolved her of responsibility.

The trial court found that defendant was aware of the scope and severity of the trespass and vandalism problems at Deverill, but purposely withheld this information from plaintiffs. In response to plaintiffs’ specific inquiry, defendant denied the existence of any trespassing problem and represented Deverill as peaceful and serene, although she knew these representations were false. Further, defendant “engaged in an artifice intended to discourage [plaintiffs] from making further inquiry about [the trespass and vandalism problems] by discrediting the Langevins” The trial court also found that “there were not sufficient indicia of trespass and vandalism problems visible on or adjacent to Deverill in 2000 to have put reasonable persons in [plaintiffs’] position on notice of the pervasive trespass problems associated with the property.”

The trial court concluded that defendant’s conduct constituted fraud and unfair and deceptive practices and entered judgment in favor of plaintiffs in the amount of \$322,753.59. The trial court also awarded reasonable attorneys’ fees in the amount of \$55,000.00 and costs of \$3,284.18. Defendant and plaintiffs appeal.

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I. Defendant's Appeal

[1] Defendant argues the trial court erred in concluding that she committed fraud. Specifically, defendant contends plaintiffs failed to demonstrate that they were denied the opportunity to investigate the property, or that they could not have discovered the trespass and vandalism problem through the exercise of due diligence. We find no merit to this argument.

“ ‘It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.’ ” *Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 707, 594 S.E.2d 796, 799 (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)), *disc. review dismissed*, 358 N.C. 732, 601 S.E.2d 535 (2004). Where such competent evidence exists, this Court is bound by the trial court’s findings of fact even if there is also other evidence in the record that would sustain findings to the contrary. *Eley v. Mid/East Acceptance Corp.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005). The trial court’s conclusions of law, by contrast, are reviewable *de novo*. *Id.*

In the present case, defendant assigned error to numerous findings of fact by the trial court, but has failed to argue any of these assignments of error in her brief on appeal. Such assignments of error are therefore abandoned, and the trial court’s findings are binding on appeal. *See* N.C.R. App. P. 28(a). We must now determine whether the findings made by the trial court support its conclusion that defendant committed fraud and unfair and deceptive practices. We begin with an examination of fraud.

An actionable claim for fraud must include the following elements: (1) a false representation or a concealment of a material fact which is (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, and (5) results in damage to the injured party. *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002), *disc. review dismissed*, 356 N.C. 694, 577 S.E.2d 889 (2003). A plaintiff’s reliance on alleged false representations by the defendant must be reasonable. *Id.* Where a plaintiff fails to make any independent investigation, or if a plaintiff is informed of the true condition of the property, reliance is not reasonable. *Id.* at 73, 574 S.E.2d at 186. “The reasonableness of a party’s reliance is a question for the jury, unless the facts are so clear that they support only one conclusion.” *Id.*

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Defendant contends plaintiffs' reliance upon her alleged misrepresentation that no trespass problem existed was unreasonable as a matter of law, in that plaintiffs failed to make a sufficient independent investigation. Further, defendant argues, plaintiffs had knowledge of potential trespassing problems from the information supplied them by Langevin. Defendant contends these factors are fatal to plaintiffs' claim. We disagree.

" 'Even if there is no duty to disclose information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses.' " *Phelps-Dickson Builders, LLC v. Amerimann Partners*, 172 N.C. App. 427, 438, 617 S.E.2d 664, 671 (2005) (quoting *Freese v. Smith*, 110 N.C. App. 28, 35, 428 S.E.2d 841, 846 (1993)). Even where a plaintiff's reliance is unreasonable,

in close cases, sellers [who] intentionally and falsely represent[] material facts so as to induce a party to action "should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.' "

Id. (quoting *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965)).

In the instant case, the evidence tended to show, and the trial court found, that "[plaintiffs] reasonably relied upon [defendant's] representations that Deverill was peaceful and serene and that it did not suffer from trespass problems." Further, the trial court found that "[defendant] intended that [plaintiffs] rely on her representations concerning the peaceful and serene character of Deverill and her denial of a trespass problem and that they forego any further inquiry concerning the subject matter." The trial court found "that there were not sufficient indicia of trespass and vandalism problems visible on or adjacent to Deverill in 2000 to have put reasonable persons in the [plaintiffs'] position on notice of the pervasive trespass problems associated with the property." Finally, the trial court found that "[defendant] engaged in an artifice intended to discourage the [plaintiffs] from making further inquiry about such issues by discrediting the Langevins in her July 3, 2000 telephone call with [Stephan]."

When plaintiffs specifically inquired of defendant regarding a potential trespass problem, she denied that such problem existed, although she had full knowledge of the severity of the trespass and vandalism problem at Deverill. The trespass problem was a material

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fact which defendant deliberately concealed in order to realize a substantial profit on the sale of her property. The trial court found that plaintiffs would not have purchased the property had they known of the trespass and vandalism problem. We conclude the trial court properly determined that plaintiffs' reliance upon defendant's false representations was reasonable and not fatal to their claim of fraud. We overrule this assignment of error.

[2] By further assignment of error, defendant argues the trial court erred in concluding her actions constituted unfair and deceptive practices. "The elements for a claim for unfair and deceptive trade practices are (1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result." *Phelps-Dickson Builders LLC*, 172 N.C. App. at 439, 617 S.E.2d at 671. Whether the facts that are proven at trial establish an unfair or deceptive practice is a question of law addressed by the court. *Id.* at 439, 617 S.E.2d at 672. " 'Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts ' " *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) (quoting *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975)). "Once the plaintiff has proven fraud, thereby establishing *prima facie* a violation of Chapter 75, the burden shifts to the defendant to prove that he is exempt from the provisions of N.C.G.S. § 75-1.1." *Id.* at 243-44, 400 S.E.2d at 442 (emphasis added) (citation omitted).

Defendant argues she is exempt from Chapter 75, in that the sale of Deverill was an "isolated occurrence" which did not affect commerce. Our Supreme Court rejected this argument in *Bhatti*:

Assuming that a "homeowner's exception" exists, its application is limited to an individual involved in the sale of his or her own residence. . . .

The defendant did not prove that the transaction was anything other than a business activity well within the banks of the stream of commerce as broadly defined by the General Assembly in N.C.G.S. § 75-1.1. As such, plaintiff is entitled to the protection of the statute.

Id. at 246, 400 S.E.2d at 444.

Defendant here was not engaged in the sale of her own residence. In fact, she had purchased the property only two months earlier for

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\$685,000.00. The trial court found that she “was motivated by the potential for profit, and she received actual gross profit in the amount of \$253,165 from her conduct[.]” As such, she has not carried her burden of demonstrating that the transaction was beyond the scope of Chapter 75. We overrule this assignment of error.

[3] Finally, defendant argues the trial court abused its discretion in awarding attorneys’ fees. “A trial court’s award for attorney’s fees may only be overturned on appeal if the trial court abused its discretion.” *Reinhold v. Lucas*, 167 N.C. App. 735, 739, 606 S.E.2d 412, 415 (2005). “Abuse of discretion occurs where a trial court’s determination cannot be supported by reason.” *Id.* Section 75-16.1 of our General Statutes provides that:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2003). In order to award attorneys’ fees under this section,

the trial court must find: (1) plaintiff is the prevailing party; (2) defendant willfully engaged in the act at issue; and (3) defendant made an unwarranted refusal to fully resolve the matter. Even if the requirements are met, an award of attorney’s fees under N.C. Gen. Stat. § 75-16.1 is in the trial court’s discretion.

Evans v. Full Circle Productions, 114 N.C. App. 777, 781, 443 S.E.2d 108, 110 (1994).

There is no evidence of an abuse of discretion by the trial court in the present case. The trial court made all of the necessary findings to support its award of attorneys’ fees. It is clear from the detailed findings in its judgment and order that the trial court examined the

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record and made reasonable findings. Although defendant assigned error to the trial court's award of costs, she has made no argument regarding costs in her brief on appeal. Defendant has abandoned this assignment of error, and we therefore do not address it. We overrule defendant's final assignment of error.

II. Plaintiffs' Appeal

[4] Plaintiffs also argue the trial court abused its discretion when it failed to award more than \$55,000.00 in attorneys' fees. The trial court found that "the time spent by plaintiffs' counsel in the prosecution of this matter was reasonably warranted by the complexity of the case, the scope of the harm suffered by the [plaintiffs] and the defendant's refusal to resolve the matter before trial." The trial court also found that "[p]laintiffs' counsel were experienced lawyers within the community, and the hourly rates they and their staff charged were reasonable both in the context of their levels of experience and in relation to their peers." Plaintiffs' attorneys submitted affidavits showing the reasonable value of the legal services rendered to plaintiffs to be \$112,869.50. Given that the trial court found that (1) the time and (2) the hourly rates by plaintiffs' attorneys were both reasonable, plaintiffs argue the trial court abused its discretion by failing to award any amount less than the sum of these two factors (in this case, \$112,869.50). We disagree.

As noted *supra*, "[e]ven if the requirements are met, an award of attorney's fees under N.C. Gen. Stat. § 75-16.1 is in the trial court's discretion." *Evans*, 114 N.C. App. at 781, 443 S.E.2d at 110. Thus, even where the trial court finds that the plaintiff is the prevailing party, and the defendant willfully engaged in unfair and deceptive practices and made an unwarranted refusal to resolve the matter, the trial court may still, in its discretion, refuse to award attorneys' fees. Given that the trial court may refuse to award any attorneys' fees, we cannot say that the decision to award approximately half of the amount requested by plaintiffs' attorneys constitutes an abuse of discretion, manifestly unsupported by reason. *See id.* We conclude there is no abuse of discretion by the trial court in its award of attorneys' fees.

Plaintiffs have also requested attorneys' fees incurred during this appeal. " 'Upon a finding that [appellees] were entitled to attorney's fees in obtaining their judgment [under N.C. Gen. Stat. § 75-16.1], any effort by [appellees] to protect that judgment should likewise entitle them to attorney's fees.' " *Eley v. Mid/East Acceptance Corp.*, 171

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N.C. App. at 376-77, 614 S.E.2d at 562 (quoting *City Finance Co. v. Boykin*, 86 N.C. App. 446, 449, 358 S.E.2d 83, 85 (1987)); *see also Garlock v. Henson*, 112 N.C. App. 243, 247, 435 S.E.2d 114, 116 (1993) (citations omitted) (“[b]ecause plaintiff is entitled to attorney fees for time spent protecting his judgment, we remand this case for a determination and award of a reasonable attorney fee for time spent defending this appeal”). Accordingly, because plaintiffs were entitled to attorneys’ fees for hours expended at the trial level, plaintiffs are entitled to attorneys’ fees on appeal. We remand to the trial court for a determination of the hours spent on appeal and a reasonable hourly rate and for the entry of an appropriate attorneys’ fee award.

The judgment and order of the trial court are affirmed. We remand for a determination of entry of an appropriate attorneys’ fee award.

Affirmed and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. JHALMAR EMMANUEL MEDINA

No. COA05-216

(Filed 6 December 2005)

1. Evidence— out-of-court statement—door opened on cross-examination—no error

Defense counsel opened the door during cross-examination to an out-of-court statement by defendant’s cousin (Jorge), and the statement was correctly admitted during redirect examination.

2. Constitutional Law— effective assistance of counsel—tactical decisions—no error

Defendant’s Sixth Amendment guarantee of the effective assistance of counsel was not violated by his counsel’s decisions about testimony and an objection. Defense counsel apparently made a tactical decision; even so, any error was not so serious that his attorney was not functioning as counsel guaranteed by the amendment.

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3. Constitutional Law— right of confrontation—detective’s testimony about witness—evidence otherwise admitted—no error

The trial court did not violate the Sixth Amendment right to confrontation in a first-degree murder prosecution by admitting a detective’s testimony that he considered defendant’s cousin Jorge (who did not testify) a material witness against defendant based on an interview with Jorge. The jury had already heard that Jorge had been with defendant before and immediately after the murder and had implicated defendant as the murderer. The State was not trying to do indirectly what it could not do directly.

4. Evidence— gang membership and colors—identification—admissible

The trial court did not err in a prosecution for first-degree murder by admitting evidence that defendant was a gang member. Defendant’s identity was in issue and the gang color and defendant’s gang involvement helped the witness in identifying defendant.

5. Appeal and Error— preservation of issues—failure to assign error—references to defendant having been in jail

Failure to assign error to a ruling by the trial court meant failure to preserve for appeal issues concerning references to defendant having been in jail.

6. Appeal and Error; Constitutional Law— preservation of issues—failure to assign error—life sentence for minor—death sentence ruling distinguished

Defendant did not assign error and did not preserve for appeal the question of whether a life sentence without parole for a 16-year old violated the Eighth and Fourteenth Amendments. The U.S. Supreme Court ruling forbidding the death penalty for those under 18, *Roper v. Simmons*, 161 L. Ed. 2d 1 (2005), did not consider life imprisonment.

Appeal by defendant from judgments entered 1 September 2004 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy Cooper, by Solicitor General Christopher G. Browning, Jr., for the State.

Kathryn L. VandenBerg, for defendant-appellant.

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TYSON, Judge.

Jhalmar Emmanuel Medina (“defendant”) appeals from judgments entered after a jury found him to be guilty of first-degree murder and attempted first-degree murder. We find no error.

I. Background

The State’s evidence tended to show that fifteen-year-old Omega Daniel Graham Morris (“Morris”) was walking his girlfriend, fourteen-year-old Emily Stitt (“Stitt”), toward home late in the evening on 10 March 2003 when Morris was shot eight times and killed. Stitt was shot in the face and in the back but survived her injuries.

A. Stitt

Stitt testified that during their walk toward home, two people crept out of the woods and approached them. One of the individuals drew a handgun out of his pocket and asked Morris, “Where is my Mother F—king speakers?” Stitt recognized the voice to be defendant’s, one of Morris’s friends. Stitt began walking and ran when she heard gunshots. Stitt testified that defendant came up beside her, shot her in the face, and she fell to the ground. Defendant pressed the hot tip of the gun onto her neck, burning her. Defendant realized that he had emptied the gun of bullets, reloaded, and shot Stitt in the back. When Stitt’s father came out of his house, defendant ran away.

As Stitt waited for an ambulance at the scene of the attack, she identified defendant to police officers as the attacker. Later that evening, Stitt told detectives that defendant wore a bandanna tied around his face, blue or black in color, covering the lower part of his face up past his nose. She told detectives that defendant: (1) had very short hair; (2) wore a hood over his head; and (3) wore high-top Chuck Taylor Converse shoes and black clothes.

Stitt informed detectives that she had known defendant for at least one month and a half. She identified defendant from a police lineup of six people. Stitt told detectives defendant lived in Holly Hills, was El Salvadorian, was a member of the Crips gang, and carried a black revolver with a brown handle.

Utilizing Stitt’s information, the police located defendant at his home. While searching defendant’s house, the police found a gray hooded sweatshirt in a bedroom being used by Jorge Sotero-Sosa (“Jorge”), defendant’s cousin. Jorge was present when the police

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searched the house. Wrapped inside the sweatshirt was a pair of black sweat pants, a black toboggan, a blue bandanna, a pair of white gloves, and Converse Chuck-Taylor high-top shoes. The shoes contained fresh mud on the soles. Rashard Little (“Little”) and Carly Ann Strand (“Strand”), defendant’s friends, recounted seeing Jorge and defendant together on the night of the murder.

B. Rashard Little

Little testified that he saw defendant on three occasions on 10 March 2003. Defendant told Little that morning he planned to kill Morris. Little saw defendant later in the afternoon when defendant retrieved his Converse Chuck Taylor high tops. Little saw defendant a third time around 11:30 p.m. Little testified that defendant and Jorge arrived at Little’s house and asked if Little wanted to go with them to kill Morris. Before Little could get dressed, Jorge and defendant had left. Little said he heard gunshots and two people running through the woods about ten minutes later.

C. Carly Ann Strand

Defendant’s girlfriend, Strand, was with defendant and Jorge until 9:00 p.m. on the night of the murder. Defendant called Strand that night and told her that he and Jorge were going to work out before going to bed. The following morning defendant called Strand from jail and told her he had killed Morris the night before and hid the pistol in the woods. At defendant’s request, Strand agreed to recover and dispose of the gun. Strand testified she and her friend, Brandi, retrieved the gun, threw it into a pond in a local neighborhood and threw the bullets into another nearby pond. After Strand’s disposal of the pistol, defendant learned that Derek Oaks, Strands’s friend, threatened to inform the police of Strand’s disposal of the gun. On defendant’s instructions, Strand took another friend, Waylen, to the pond so Waylen could remove the pistol from the pond. Although Strand stated she did not see Waylen remove the pistol from the pond, law enforcement officers later searched the pond but did not find a gun.

D. Tijuan Kenkins

Tijuan Kenkins (“Kenkins”) testified that he knew Morris and defendant. He had a conversation with defendant about a week and a half before Morris was murdered. In that conversation defendant told Kenkins he wanted to kill Morris because some of defendant’s belongings being kept at Morris’s house were missing. Kenkins also testified

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that defendant had threatened to kill him the following day if he told Morris and his family about defendant's plan to kill Morris. Kenkins recalled that defendant carried a black .38 revolver with a brown handle. Kenkins testified, without objection, that defendant was a member of the Crips gang and that he wore a blue bandanna.

E. Felicia Ann Garland

Felicia Ann Garland ("Garland"), defendant's girlfriend, testified that she had a conversation with defendant on Thursday afternoon during the first week of the trial. Defendant told her that a mutual friend would pick her up at her high school at 6:30 a.m. the next morning. Garland testified that she had agreed to go with defendant, who had skipped court during lunch and was on the run. Defendant told Garland that he had killed Morris and had attempted to kill Stitt. Defendant stated Morris had worn his clothes and stole his speakers. Defendant told Garland he sent Strand to retrieve the murder weapon and explained Strand had disposed of it in the pond behind her old neighborhood. Garland testified that defendant stated he had told Strand to tell the truth because he was leaving and never coming back. While the trial was ongoing, defendant attempted to flee but was apprehended.

Defendant was convicted of one count of first-degree murder and one count of attempted first-degree murder. He was sentenced to life imprisonment without parole on the conviction for first-degree murder. Defendant was sentenced to a minimum of 189 months and a maximum of 236 months for the attempted murder conviction. The sentences were ordered to run consecutively. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it: (1) admitted Jorge's alleged statements; (2) admitted evidence that he was a gang member and was previously in jail; and (3) sentenced him, a sixteen-year-old, to life imprisonment without parole.

III. Standard of Review

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Sims*, 161 N.C. App. 183, 190, 588 S.E.2d 55, 60 (2003) (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)).

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IV. Out of Court Statements

Defendant argues: (1) the admission of Jorge's alleged statements violated defendant's right to confront witnesses against him; (2) defense counsel provided ineffective assistance in eliciting testimony about Jorge's alleged statements to Little; and (3) the trial court erred in allowing Charlotte Police Detective Harold Henson ("Detective Henson") to testify that he considered Jorge to be a "material witness" against defendant.

A. Jorge's Statements

[1] While cross-examining Little, defense counsel asked whether part of Little's testimony was based on information Jorge had told him. Defense counsel asked Little to recount Jorge's out of court statement as follows:

Q. What did Jorge tell you?

A. He told me what happened.

On re-direct, the State used the same phrase in repeating the question to Little. Without objection, Little testified on redirect as follows:

Q. The defense lawyer asked you some question that you answered by telling him that you were told by Jorge what had happened to [Morris] and [Stitt]; is that correct?

A. Yes.

Q. What did Jorge tell you had happened to [Morris] and [Stitt]?

A. He told me that [defendant] killed them.

Our Supreme Court has stated, "[t]he purpose of redirect examination is to clarify any questions raised on cross-examination concerning the subject matter of direct examination and to confront any new matters which arose during cross-examination." *State v. Baymon*, 336 N.C. 748, 754, 446 S.E.2d 1, 4 (1994) (citing *State v. Price*, 301 N.C. 437, 452, 272 S.E.2d 103, 113 (1980)).

Defense counsel initiated testimony concerning Jorge's statements to Little during cross-examination. Defendant concedes "this opened the door for the State to elicit any alleged statements made by Jorge." The State was entitled to introduce evidence to explain the

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statement on redirect. *Id.* Little's testimony provided that explanation. This assignment of error is overruled.

B. Ineffective Assistance of Counsel

[2] Defendant argues that defense counsel was ineffective by: (1) eliciting information about Jorge's statement directly from Little; (2) eliciting information from Stitt regarding his involvement in a gang and time spent in jail; and (3) failing to object when a police officer testified that Stitt had told him defendant was a member of a gang.

In *Strickland v. Washington*, the United States Supreme Court provided a two-prong test for a defendant to establish ineffective assistance of counsel. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The test requires:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

Our Supreme Court has stated, "this court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). In *State v. Lowery*, the Court stated, "[w]e ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions." 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

Defendant admits his counsel's decision to ask Little about Jorge's statements was an apparent tactical decision. We will not "second-guess counsel's tactical decisions." *Id.* Even if defense counsel erred in eliciting the testimony from Little and Stitt and in failing to object to the police officer's testimony, the error was not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693. This assignment of error is overruled.

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3. Detective Henson's Testimony

[3] Jorge did not testify at trial. Detective Henson testified that he interviewed Jorge on 11 March 2003. Over objection, the prosecutor elicited the following testimony:

Q. As a result of that interview, please state whether or not you considered Jorge to be a material witness against the defendant.

A. Yes, Sir, I did.

Defendant argues the Detective Henson's testimony that Jorge would have been a "material witness" was based on hearsay statements he elicited from Jorge in violation of defendant's Sixth Amendment right of confrontation. Defendant contends Detective Henson's testimony regarding Jorge constitutes hearsay because Detective Henson "was testifying as to the content of Jorge's statement, and Jorge was not available for cross-examination at trial."

Under *Crawford v. Washington*, the confrontation clause prohibits testimonial statements from being admitted into evidence when the declarant is unavailable at trial and was not subject to cross-examination when the statement was made. 541 U.S. 36, 59, 158 L. Ed. 2d 177, 197 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.").

In *Schaffer v. State*, the Court of Criminal Appeals of Texas held a police officer's testimony regarding information he received out of court from an unavailable witness in the course of his investigation was inadmissible hearsay. 777 S.W.2d 111 (Tex. Crim. App. 1989). The defendant claimed to be a police informant when police officers found him inside a van that contained peyote, a controlled substance. *Id.* at 112. In attempting to disprove the defendant's status as a police informant, the State called Officer Segovia to testify. *Id.* Officer Segovia testified that as a result of his investigation he did not think the state should drop the case against the defendant:

Q. Officer Segovia, when was the first time you heard the name of—a person by the name of Jimmy Seals?

A. This morning.

Q. And who, if anybody, informed you of that name?

A. You did, sir.

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Q. And were you able to contact Officer Seals?

A. Yes, sir.

Q. And when was this?

A. This morning.

Q. And did you have occasion to talk to him?

A. Yes, sir, I did.

Q. Without telling us what he told you, Officer Segovia, would you, at this time, ask the State to drop charges against Mr. Schaffer?

A. No, sir.

Id. at 113. Mr. Seals was not subpoenaed for trial and did not testify. *Id.* The court stated:

In the case before us, the State did indirectly that which it could not do directly—Officer Segovia’s testimony informed the jury that Seals told him that appellant was not an informant . . . There is no doubt that the State’s sole intent in pursuing this line of questioning was to convey to the jury that Seals had told Segovia that appellant was not an informant.

Id. at 114.

In the present case, the State did not seek indirectly to do what it could not do directly. Detective Henson’s testimony did not convey to the jury any specific statement Jorge made to Detective Henson. Rather, as a result of his investigation, Detective Henson testified that Jorge would have been a material witness.

When Detective Henson testified, the jury had already heard, without objection, that Jorge had implicated defendant as the murderer. The jury was aware through other testimony that Jorge was staying with defendant and had been with defendant immediately before and after the murder. Moments before the shooting, Jorge was present when defendant asked Little to come with them to murder Morris. Jorge stood as a material witness in defendant’s prosecution.

Our Supreme Court in *State v. Covington*, made clear “that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law

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so as to present his side of the case.” 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976) (citing *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974)).

Given the uncontested evidence before the jury about Jorge’s knowledge of the shooting, Jorge would have been a material witness. The court did not violate defendant’s Sixth Amendment right of confrontation by admitting the evidence. This assignment of error is overruled.

V. Victim’s Identification of Defendant

[4] Defendant argues the trial court erred when it admitted evidence that he was a gang member and was previously in jail.

During Stitt’s direct testimony she stated:

Q. Do you recall the detectives asking you if J.R. was involved in a gang?

DEFENSE: Objection

COURT: Overruled

A. Yes.

Q. What did you tell them?

A. He was a crip.

....

Q. Do you recall the detective asking you if J.R. had some problem with Buddy concerning some clothes or something?

A. Yes.

Q. What did you tell her?

A. That before he had went to jail, he had left—

DEFENSE: Objection

COURT: Sustained

A. That he left his speakers at Buddy’s house, and when he got back, they weren’t there.

DEFENSE: Motion to Strike

COURT: Motion to Strike is Allowed

....

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Q. Ms. Stitt, you said that the bandanna was blue.

A. Yes.

Q. And you knew that the Crip colors were blue.

A. Yes.

During cross-examination of Stitt, defense counsel elicited further testimony regarding defendant's time in jail. Following Stitt's testimony, the jury sent a note to the trial court asking:

(1) How does Emily know JR was in a gang?

(2) Was Buddy in a gang?

The prosecutor elicited testimony from Jenkins concerning defendant being in jail and defendant's involvement in a gang. Defendant argues the State should not have presented evidence of defendant's bad character when he neither testified nor introduced evidence of his good character. Defendant contends that evidence that he was in a gang and served time in jail is evidence of bad character and was improperly admitted and resulted in an unfair trial.

Rule 404(b) of the North Carolina Rules of Evidence states:

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003) (emphasis supplied). Our Supreme Court has stated, "Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its only probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002).

In *State v. Ruof*, the defendant argued the trial court erred in allowing evidence that he was a gang member. 296 N.C. 623, 252 S.E.2d 720 (1979). Our Supreme Court stated:

Defendant contends that the trial judge erred in allowing testimony relating to defendant's association with "The Outlaws"

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motorcycle gang because such evidence was irrelevant and was introduced solely to prejudice the jury. We do not agree. Relevant evidence will not be excluded simply because it may tend to prejudice the jury or excite its sympathy. The witnesses who identified defendant testified that they had seen him at “The Hut” prior to the night in question dressed in “Outlaw” clothes and in the company of other “Outlaws.” This testimony was relevant and admissible for the purpose of identifying defendant.

Id. at 630, 252 S.E.2d at 725 (citing *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, *cert. denied*, 409 U.S. 888, 34 L. Ed. 2d 145 (1972)).

Defendant’s identity was at issue at trial. Stitt’s familiarity with the gang’s color of blue and her knowledge of defendant’s involvement in the gang aided her in identifying defendant as the perpetrator. “This testimony was relevant and admissible for the purpose of identifying defendant.” *Id.*

[5] Defendant argues that the references made by two witnesses concerning his time in jail violated his right to a fair trial. However, defendant failed to preserve this issue for appeal. Defendant did not assign as error any rulings by the trial court regarding the introduction of any evidence involving his time in jail. N.C.R. App. P. 10(a) (2004); *State v. Diehl*, 353 N.C. 433, 438, 545 S.E.2d 185, 188 (2001) (“The scope of appellate review is limited to those issues raised in an assignment of error set out in the record on appeal, N.C.R. App. P. 10(a), and where no assignment of error can fairly be considered to encompass additional issues that a party seeks to raise at the appellate level, those issues are not properly before the reviewing court.”), *cert. denied*, 356 N.C. 170, 568 S.E.2d 624 (2002). We decline to consider this issue.

Defendant failed to show the trial court’s allowing admission of testimony regarding his involvement in a gang was an abuse of discretion. This assignment of error is overruled.

VI. Life Imprisonment Without Parole

[6] Defendant argues the trial court erred when it sentenced him, a sixteen-year-old, to life imprisonment without parole in violation of the United States and North Carolina Constitutions. Defendant contends that because the Supreme Court recently held “[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed,” sentencing a sixteen-year-old to life imprisonment also vio-

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lates the Eighth and Fourteenth Amendments. *Roper v. Simmons*, 543 U.S. 551, 578, 161 L. Ed. 2d 1, 28 (2005). In *Roper*, the Court did not consider life imprisonment of juveniles. Defendant failed to raise this argument at trial and did not assign it as error. Defendant failed to preserve this argument for appeal. This issue is not properly before us and is dismissed.

VII. Conclusion

The trial court did not err in admitting: (1) Detective Henson's testimony that Jorge was a material witness; (2) Little's statements on redirect concerning what Jorge told him; or (3) evidence that defendant was a gang member and was previously in jail. Defendant failed to preserve for review the issues whether his Eighth and Fourteenth Amendment rights were violated when he was sentenced to life imprisonment without parole. We find no error in defendant's trial or sentence.

No error.

Judges JACKSON and SMITH concur.

AMY TERASAKA, PLAINTIFF V. AT&T, DEFENDANT

No. COA04-1572

(Filed 6 December 2005)

Workers' Compensation— carpal tunnel—disability—incapacity for any work—medical evidence inadequate

A workers' compensation disability award for carpal tunnel syndrome was reversed where plaintiff failed to meet her burden under the only prong of *Russell v. Lowes*, 108 N.C. App. 762, applicable to these facts. She did not produce medical evidence that she was physically or mentally incapable of work in any employment.

Judge GEER dissenting.

Appeal by defendant from Opinion and Award of the Industrial Commission entered 1 July 2004 by Commissioners Bernadine S. Ballance, Pamela T. Young, and Thomas Bolch. Heard in the Court of Appeals 8 June 2005.

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*Frederick R. Stann for plaintiff-appellee.**Brooks, Stevens & Pope, P.A., by Joy H. Brewer for defendant-appellant.*

CALABRIA, Judge.

AT&T (“defendant”) appeals the award of the North Carolina Industrial Commission (the “Commission”) granting benefits to Amy Terasaka (“plaintiff”) based on a diagnosis of carpal tunnel syndrome. We reverse.

On 14 February 2002, plaintiff filed a Form 18 alleging she developed pain in both of her hands on or about 17 October 2001 while typing during an intense three-day customer service representative training course. In response, defendant filed a Form 61 denying plaintiff’s claim. At the time, plaintiff was in her early forties and had consistently worked in the secretarial field throughout her adult life.

On 30 December 1996, plaintiff started her employment with defendant in New Jersey as a senior records clerk. Her duties included typing approximately four hours of every eight hour work-day. On 1 February 1997, she transferred to a different division in the New Jersey office, retained her position as a senior records clerk, and spent approximately six hours of each ten hour workday typing.

On 13 September 2001, plaintiff transferred to the Gastonia, North Carolina office of defendant to become a customer service representative. On or about that date, she started a three week customer service representative training course. Two days into the course, she contracted the flu and missed the remainder of the course. She then undertook an intensive three day course to learn what she had missed. During this course, she typed approximately eight hours a day for all three days. Toward the end of the course, on or about 17 October 2001, she felt tingling and numbness in her hands. Shortly thereafter, she started work as a customer service representative.

On 23 October 2001, she experienced numbness in both hands with pain extending from her hands to her shoulders, which prevented her from working. She visited several doctors and was eventually seen by Dr. David S. Baker (“Dr. Baker”) on 13 March 2002. After examining plaintiff and reviewing her nerve conduction tests, Dr. Baker diagnosed plaintiff with carpal tunnel syndrome in both wrists. He injected cortisone into her wrists, and her symptoms briefly subsided but returned. On 24 April 2002, Dr. Baker performed

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surgery on her left wrist to release pressure on the nerve in the carpal tunnel. On 15 May 2002, plaintiff reported relief of symptoms in her left hand, and on 27 June 2002, Dr. Baker performed surgery on her right wrist. On 25 September 2002, plaintiff reported severe pain in both hands and wrists, which prevented her from using her hands for approximately two to three weeks. Dr. Baker's exam indicated tendinitis of the wrists, and he injected both her wrists with cortisone at the location of the pain.

On 9 October 2003, after returning to work for four days, plaintiff reported severe pain and an inability to use her hands for normal activities. Dr. Baker stated he could not explain her level of pain and dysfunction on any medical or scientific basis and told her there were no other diagnostic or treatment options in his specialty that would benefit her. He further opined that typing is a repetitive activity that could cause carpal tunnel syndrome. However, he could only say plaintiff's typing might be an influencing factor and could not quantify to what degree typing was the cause as compared to other possible factors.

Twice in December 2002, plaintiff saw Dr. Raymond C. Sweet ("Dr. Sweet"), a neurosurgeon. Dr. Sweet's physical examination of plaintiff's hands and wrists indicated some type of nerve condition. However, her nerve conduction tests indicated normal functioning. He stated he had never seen a patient with normal nerve conduction tests have positive indicators for a nerve condition based on physical examination and would not recommend another operation when presented with normal nerve conduction tests. He stated repetitive hand motions, such as typing six hours out of a ten hour workday, created a greater risk of developing carpal tunnel syndrome, and carpal tunnel syndrome could develop in certain individuals in as little as three to four months. Moreover, Dr. Sweet stated that in his medical opinion plaintiff's work history of typing was a significant factor in her developing carpal tunnel syndrome. He stated that with the exception of the nerve conduction tests, her physical exam signs and history were consistent with her complaints of pain and that plaintiff likely damaged the median nerve running through her wrist. Additionally, he noted if her condition had not changed since her visits to him in December 2002, it would be unlikely she would be able to return to a job that involves repetitive hand and wrist motion.

After a 19 May 2004 hearing on this matter, the Commission concluded: (1) "plaintiff developed bilateral carpal tunnel syndrome, an occupational disease, due to causes and conditions characteristic of

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and peculiar to her employment that was not an ordinary disease of life to which the general public is equally exposed”; (2) plaintiff proved “that she was temporarily totally disabled from 13 March 2002, less four days, and continuing thereafter”; (3) “[p]laintiff is entitled to receive total disability benefits in the weekly amount of \$502.36 from 13 March 2002, less four days, and continuing until further order of the [Commission]”; and (4) “defendants shall pay all medical expenses incurred for the treatment of her occupational injuries, including those arising from future treatment by a suitable physician addressing pain disorders[.]” Defendant appeals.

Defendant raises several assignments of error on appeal. We initially address whether plaintiff met her burden of proving disability. Because we hold that plaintiff failed to meet her burden, we do not address defendant’s remaining assignments of error.

To obtain workers’ compensation benefits, a claimant bears the burden of proving both the existence and the extent of disability. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). Specifically, in the absence of a Form 21 or other admission of liability for compensation, the employee bears the burden of proving she is disabled. *Demery v. Converse, Inc.*, 138 N.C. App. 243, 249, 530 S.E.2d 871, 876 (2000). An employee injured in the course of her employment is disabled under the Act if the injury results in an “incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.” N.C. Gen. Stat. § 97-2(9) (2003). An employee may meet the burden of showing disability in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in *any* employment[]; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment[]; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[]; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted) (emphasis added).

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The determination that an employee is disabled is a conclusion of law that must be based upon findings of fact supported by competent evidence. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). In support of its conclusion that plaintiff is temporarily totally disabled, the Commission made the following pertinent findings of fact:

4. . . . Plaintiff also saw Dr. David Baker, who first examined her on 13 March 2002, when plaintiff presented with severe hand and arm pain with numbness and tingling. . . . At that point, Dr. Baker did not believe plaintiff could work and took her out of work on 13 March 2002.

5. On 25 September 2002, plaintiff complained of severe pain in both hands and wrists. . . . [Doctor Baker] excused her from work until 9 October 2002. . . . On 20 November 2002, Dr. Baker believed that there was no more he could offer her in terms of treatment. . . . He was unable to make any recommendations about her future employment.

7. . . . [Dr. Sweet] last saw plaintiff on 23 December 2002. . . . Dr. Sweet was of the opinion that plaintiff could not return to any job which required repetitive motion of the hands and wrists.

10. . . . As of 13 March 2002, plaintiff was *unable to work in any capacity* due to her carpal tunnel syndrome and, except for four days when she later attempted to return to work, plaintiff remained disabled.

11. In that plaintiff has continued to experience debilitating symptoms that Dr. Baker refused to address, it appears that plaintiff should be seen by a doctor qualified to diagnose pain disorders. There is no evidence that plaintiff has reached maximum medical improvement.

(Emphasis added).

Finding of fact 10 is supported by competent evidence because plaintiff testified as follows:

Q: . . . [C]an you return to your past work that involved so much typing [?]

A: No, sir, I can't. . . . I won't be able to use my hands ever.

. . .

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Q: Besides typing, do you have any other problems using your hands?

A: My activity of daily living is severely compromised. . . . My husband has to dress me, has to turn knobs for me, meaning water faucets, door handles. He has taken on all of the household duties, laundry, vacuuming, feeding us, grocery shopping, driving. . . . I can't really do much of anything.

Q: How about driving a car?

A: No. . . . I have hand cramps inconsistently. I would be afraid of causing injury to myself or others.

. . .

Q: But are you able to use your hands on a regular basis for a job?

A: No.

Because finding 10 is supported by competent evidence it is conclusive on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Since the Commission conclusively found "plaintiff was *unable to work in any capacity* due to her carpal tunnel syndrome," the only *Russell* prong applicable on these facts is the first prong. The dissent contends we have improperly applied the *Russell* test by holding "that because plaintiff Amy Terasaka failed to offer medical evidence meeting the first method of proof, she has necessarily failed to prove total disability." The dissent misconstrues our holding. While we agree that a plaintiff can ordinarily prove disability under any of the four *Russell* prongs, see *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 342, 561 S.E.2d 298, 302, on these particular facts, the Commission's finding 10 is conclusively established and precludes us from considering any of the other *Russell* prongs.

Thus, under the only *Russell* prong applicable on these facts, in order for plaintiff to meet her burden of proving disability, she had to produce *medical evidence* that she is physically or mentally, as a consequence of the work related injury, incapable of work in *any* employment. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. However, the Commission found in finding 7, however, that the medical evidence merely showed "plaintiff could not return to any job which required repetitive motion of the hands and wrists." This finding does not amount to a finding that plaintiff could not work in *any* employment. Finding 7 is supported by competent evidence in that

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Dr. Sweet testified that “it’s unlikely [plaintiff] would be able to return to a job that involves repetitive hand motion and wrist motion” based on his medical analysis. Moreover, we cannot remand for additional findings because the transcripts reveal no medical evidence that could support a finding that plaintiff was incapable of work in *any* employment. Accordingly, because plaintiff failed to meet her burden of establishing disability under *Russell*, we hold the Commission erred in concluding that plaintiff “prove[d] that she was temporarily totally disabled from 13 March 2002, less four days, and continuing thereafter.” Furthermore, the Commission’s award based on this conclusion was likewise in error, and we reverse the opinion and award of the Commission.

Reversed.

Judge ELMORE concurs.

Judge GEER dissents with a separate opinion.

GEER, Judge, dissenting.

I believe that the majority has failed to properly apply the test in *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993) and, therefore, respectfully dissent. As the majority acknowledges, an employee may meet her burden of proving disability in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. at 765, 425 S.E.2d at 457 (internal citations omitted). The majority, however, holds that because plaintiff Amy Terasaka failed to offer medical evidence meeting the first method of proof, she has necessarily failed to prove total disability.

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An employee contending that she is totally disabled is not limited to proving by medical evidence her incapacity to work at any employment. As this Court emphasized in *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005), “[t]he absence of medical evidence does not preclude a finding of disability under one of the other three [Russell] tests.” See also *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 342, 561 S.E.2d 298, 302 (“While we agree that plaintiff’s medical evidence is insufficient to show disability, we conclude that plaintiff has met his initial burden of production through other evidence.”), *disc. review denied*, 355 N.C. 747, 565 S.E.2d 193 (2002).

The second and third methods of proof under *Russell* lead to the same conclusion as the first method of proof: that the employee is unable to work in any capacity. The first method establishes that the employee is medically incapable of working, while the second and third methods focus on the vocational component of disability. Under those two methods, an employee is deemed totally disabled because even though the employee may be medically capable of performing work, employers nonetheless will not hire the employee. See *White*, 167 N.C. App. at 673, 606 S.E.2d at 399-400 (affirming award of total disability for closed period based on the Commission’s finding that the plaintiff, during that period, made unsuccessful efforts to find suitable work); *Bridwell*, 149 N.C. App. at 343-44, 561 S.E.2d at 302 (holding that even though the medical evidence did not support the Commission’s findings that the plaintiff was restricted from any and all employment, the award of total disability should be affirmed based on findings that the plaintiff had unsuccessfully sought suitable employment). I can find no basis upon which to distinguish *White* and *Bridwell* from this case.

Thus, Terasaka was permitted to meet her burden of proving total disability by producing, as she did, “evidence that [she] is capable of some work, but that [she] has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment.” *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. I disagree with the majority’s suggestion that the Commission considered only the first *Russell* method of proof. Nothing in the opinion and award indicates such a limitation. To the contrary, the Commission specifically found that “[p]rior to the hearing before the deputy commissioner, plaintiff had looked extensively for other types of work and had not received any job offers.” This finding of fact specifically refers to the second method of proof set out in *Russell*.

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That finding is in turn supported by Terasaka's testimony that she had made approximately 500 attempts to find jobs, using the Internet, the newspaper, and the telephone, but that she received no job offers. Defendants challenge the credibility of that testimony and argues that "the greater weight of the evidence" shows—despite this testimony—that Terasaka was not disabled. This argument fails to recognize the appropriate standard of review. The Commission's findings of fact are conclusive upon appeal if supported by any competent evidence, even if there is evidence to support a contrary finding. *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). Moreover, on appeal, this Court may not re-weight the evidence or assess credibility. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Since the Commission's finding of fact regarding Terasaka's job search is supported by competent evidence and since that finding is sufficient to support the conclusion that Terasaka met her burden of proving a total incapacity to earn wages, I would uphold the Commission's determination that Terasaka is totally disabled. With respect to defendants' remaining arguments, I do not find them persuasive.

Defendants argue that the evidence is insufficient to support the Commission's determination that Terasaka suffered an occupational disease. As our Supreme Court explained in *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983), to be considered an occupational disease under N.C. Gen. Stat. § 97-53(13) (2003), a condition must be:

(1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

308 N.C. at 93, 301 S.E.2d at 365 (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)); see also *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979). The Court further held that the first two elements "are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365. The causation requirement "is satisfied if the employment 'significantly contributed to, or was a significant causal factor

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in, the disease's development.' " *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (quoting *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369-70), *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000).

Defendants argue that the evidence is insufficient to permit a finding either that Terasaka was at increased risk of suffering carpal tunnel syndrome or that her work caused her carpal tunnel syndrome. Dr. Sweet, however, specifically testified that a person who types four to six hours a day—as Terasaka testified she did—is at a greater risk of developing carpal tunnel syndrome than the general public. Dr. Baker similarly confirmed that employees who do a lot of typing have an increased risk of carpal tunnel syndrome, although he indicated that the number of hours of typing required to trigger the syndrome varies from person to person. Further, after plaintiff's counsel set out a hypothetical question that extended over three pages of transcript and specified the pertinent facts relating to Terasaka's work and medical history, Dr. Sweet expressed the opinion that Terasaka's work was a "significant contributing factor" to her carpal tunnel syndrome. This testimony is sufficient to meet the requirements of *Rutledge*.

Defendants' arguments regarding Dr. Sweet's testimony relate to questions of credibility and weight, issues that this Court may not revisit. It is well-established that the Commission is the "sole judge of the credibility of the witnesses, and of the weight to be given to their testimony[;] . . . it may accept or reject the testimony of a witness . . . in whole or in part" *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951). Defendants point to portions of Dr. Sweet's testimony that they contend show speculation. As, however, Judge Hudson stated in a dissenting opinion adopted by the Supreme Court in *Alexander v. Wal-Mart Stores, Inc.*, 359 N.C. 403, 610 S.E.2d 374 (2005) (per curiam), it is not "the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting).

Finally, defendants argue that Terasaka's current symptoms are unrelated to any occupational disease that she may have suffered. Again, to agree with defendants, this Court would have to accept

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their dismissal of Dr. Sweet's testimony. I do not believe that we have the authority to do so. Accordingly, I would affirm the decision of the Full Commission.

STATE OF NORTH CAROLINA v. THEODORE PITTMAN, JR., DEFENDANT

No. COA04-417

(Filed 6 December 2005)

1. Homicide— attempted first-degree murder—motion to dismiss—sufficiency of evidence—specific intent to kill

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree murder of a child, because the State presented sufficient evidence that defendant possessed the specific intent to kill the child including that: (1) defendant left a six-week-old baby with a towel knotted around her face in a collapsing shed some distance from the nearest house with temperatures in the 30-degree range; (2) during the next two days defendant did nothing to retrieve the child or assure her discovery by others; and (3) defendant acted in order to avoid paying child support. A jury could reasonably infer that defendant did not intend for anyone to find or hear the child and that he intended her to die from exposure or lack of food and hydration.

2. Constitutional Law— right to remain silent—Miranda protections not applicable when questioned by neither an officer nor someone acting as an agent

The trial court did not commit plain error in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by allowing the child's mother to testify regarding defendant's failure to respond to questions she asked him in letters concerning why he kidnapped their daughter, because: (1) the mother's testimony did not reference any silence of defendant in response to questioning by law enforcement, and Miranda's protections apply only when a defendant is subject to custodial interrogation; (2) the mother's questions were posed by her and the record contains no indication that she was acting at the behest of law enforcement; and

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(3) even if Miranda were applicable, defendant chose not to remain silent when he voluntarily wrote back to the mother.

3. Constitutional Law— due process—consistency of theories—kidnapping—sex offender registration

The trial court did not violate defendant's due process rights in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by allegedly presenting inconsistent theories at trial when it argued throughout trial that defendant was the child's father but then at sentencing told the court that there was no evidence presented that defendant was in fact the father when it requested that defendant be required to register as a sex offender based on the fact that he kidnapped the child. However, when the case is remanded for resentencing based upon another violation in this case, the trial court should revisit the recommendation regarding registration because there is no basis for requiring defendant to register as a sex offender when the only evidence in the record indicates that defendant is the father of the kidnapped child.

4. Sentencing— aggravating factor—failure to submit to jury—*Blakely* error

The trial court erred in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by sentencing defendant on an aggravating factor that it found without submitting the factor to the jury, and the case is remanded for resentencing in accordance with *Blakely*, 542 U.S. 296 (2004), and *Allen*, 359 N.C. 425 (2005). However, defendant's argument that the aggravating factor should have been alleged in the indictment has already been rejected by *Allen*.

Appeal by defendant from judgment entered 29 October 2003 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 10 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Marilyn G. Ozer for defendant-appellant.

GEER, Judge.

Defendant Theodore Pittman, Jr. appeals his conviction of first degree kidnapping of a child, conspiracy to commit kidnapping, and

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attempted first degree murder of the child. Defendant argues on appeal primarily (1) that the State failed to present sufficient evidence that defendant had a specific intent to kill the child and (2) that the trial court committed plain error in admitting testimony that defendant had failed to answer the mother's questions regarding why he had taken the child. We hold that the State's evidence was sufficient to defeat a motion to dismiss when it tended to show that, in order to avoid paying child support, defendant, in 30-degree weather, abandoned an infant in a remote, dilapidated shed where she would not likely be found. We further hold that since the record contains no evidence that the mother's inquiries were instigated by the State, they did not constitute custodial interrogation and, therefore, the mother could permissibly testify about defendant's failure to respond to her questions. Although we conclude that defendant received a trial free of prejudicial error, we agree with defendant's subsequently filed motions for appropriate relief that the trial court erred under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), in imposing an aggravated sentence. We, therefore, remand for a new sentencing hearing in accordance with *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

Facts

The State's evidence tended to show the following. Daquana Battle testified that defendant was the father of her six-week-old daughter. When Battle told defendant that she was pregnant, he told her that he did not want to go to court, but that "he would pay out of his pocket like he did with his other kids" and that "whenever [she] needed something just to call and he would get it to [her]." After the baby was born, however, Battle's mother told defendant that she was going to take him to court to force him to make child support payments.

David Parker, defendant's former roommate, testified that on 4 November 2002, defendant asked him to help take the baby from Battle. Parker believed that defendant wanted to avoid paying child support. Defendant told Parker that he would get Battle to leave her house by calling her on the phone and that Parker could then go into the house and take the child. After defendant promised to "take care" of Parker, Parker agreed to the plan.

Defendant and Parker drove to Battle's house. Battle and her daughter were lying in bed when defendant called and asked if he could talk to Battle about a Christmas present for the baby. Battle

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walked outside to talk with defendant, leaving her daughter on the bed. The conversation lasted for about 10 to 15 minutes. During that time, Parker entered the house, went into the bedroom, picked up the baby, and left the house by the back door while holding the baby underneath his jacket. As Battle started to go back inside her house, defendant blew his car horn—the agreed-upon sign to let Parker know Battle was returning. At the sound of the horn, Battle turned around, but defendant looked as if he was motioning to someone else.

Battle then turned back towards the house and saw Parker running from the back door towards defendant's car with "his arms balled up." When Parker saw Battle he changed direction and started running toward the backyard. After Battle went back inside, defendant telephoned her again and explained that he had been honking at his cousin. While on the phone, Battle realized her daughter was missing and told defendant. After defendant asked her not to call the police or her mother because he had "to drop this dope off," Battle waited 20 minutes and then called both the police and her mother.

In the meantime, Parker had walked with the baby back to his house where he met defendant. The two men then drove with the baby to a house owned by Stan Dempsey that was located in the country, a few miles south of Rocky Mount. When they arrived at Dempsey's house, defendant knocked on the door, but there was no answer. Defendant told Parker to take the child to an unheated shed located approximately 100 yards from the house. The shed had partially collapsed and there were shrubs and trees growing all around it. Inside, the shed was full of trash, debris, broken glass, and bottles, and the ceiling rafters had come down and were leaning. Parker left the child in the center of the shed. As defendant and Parker were leaving, Dempsey walked outside. Defendant told Dempsey that he would return later. Later that morning, defendant called Dempsey and told him that "he might need [Dempsey] to cover something [up]."

When Edward Collins of the Rocky Mount Police Department responded to Battle's call, Battle told him that defendant was angry about the prospect of paying child support because he already had other children and did not need additional financial responsibilities. Defendant subsequently returned to Battle's house. During Collins' interview of defendant, defendant showed no "outward emotion" and claimed he did not know that the baby was missing. Defendant and Battle then went to ask Parker to return to Battle's house, but when Parker saw the police, he left immediately.

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That evening, the police arrested Parker, who admitted that he had helped defendant take the baby from Battle's house. Following defendant's arrest, defendant claimed he did not know why Parker would implicate him. Defendant continued to deny any type of involvement in the baby's disappearance. At some point on the evening of 4 November 2002, defendant called Dempsey and said that "Parker had got [defendant] in some trouble."

Two days later, Dempsey called the Rocky Mount Police Department after reading a story about a baby being kidnapped accompanied by defendant's and Parker's pictures. Dempsey told Detective Mike Lewis that he had seen defendant and Parker at his house on the morning of 4 November 2002. After talking with Dempsey, Detective Lewis began searching and found the baby lying on some dirt behind a pile of trash in the shed. The child's mouth and nose were covered with a towel tied in a knot and she did not have a jacket or coat. During the two days that the child was missing, it had rained and the temperature had dropped into the 30s. At first, the officers thought the baby was dead, but they rushed her to the hospital once they realized she was still alive.

On 13 January 2003, defendant was indicted on one count of attempted first degree murder, one count of first degree kidnapping, and one count of felony conspiracy. At trial, defendant testified on his own behalf. According to defendant, Parker told defendant at 3:30 a.m. on the day the baby disappeared (1) that he owed a large amount of money to Jamaican drug dealers and needed help and (2) that Battle's mother had threatened to go to the police about Parker's sexual activity with Battle's younger sister. Defendant testified that he did not see Parker until later that day when he and Battle asked Parker to come to the house to help look for the baby. Defendant claimed that he learned the child was missing when he was driving to Dempsey's house to "cook cocaine." Defendant denied any part in the kidnapping and testified he thought Parker took the baby because Parker was mad at defendant for moving out and leaving him to pay the bills.

The jury found defendant guilty on all three counts. During sentencing, the trial judge found as an aggravating factor that the victim was very young and found as mitigating factors that defendant had been honorably discharged from the armed services, had supported his family, and had a support system in the community. The judge determined that the aggravating factor outweighed the mitigating factors and sentenced defendant in the aggravated range to consecutive

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sentences of 196 to 245 months on the attempted murder conviction, 92 to 120 months on the first degree kidnapping conviction, and 80 to 105 months on the conspiracy conviction. Defendant timely appealed and, while this case was pending on appeal, filed two motions for appropriate relief based on *Blakely*.

I

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss, arguing that the State presented insufficient evidence that defendant had a specific intent to kill the child. When considering a motion to dismiss for insufficient evidence, the trial court must determine whether the State has presented substantial evidence of every essential element of the crime and that the defendant was the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

The elements of attempted first degree murder are: "(1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285, 125 S. Ct. 1600 (2005). Rather than simply showing that a defendant committed an intentional act that could have resulted in death, the State "must show that the defendant intended for his action to result in the victim's death." *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). Defendant argues only that the State failed to present sufficient evidence of a specific intent to kill.

Because the intent to kill involves a state of mind, " 'ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.' " *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d

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83, 86-87 (1994) (quoting *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964)). “Moreover, an assailant ‘must be held to intend the natural consequences of his deliberate act.’” *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (quoting *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973)).

After reviewing the record, we hold that the State presented sufficient evidence that defendant possessed the specific intent to kill the child. The State offered evidence that defendant left a six-week-old baby with a towel knotted around her face in a collapsing shed some distance from the nearest house with temperatures in the 30-degree range. During the next two days, defendant did nothing to retrieve the child or assure her discovery by others. A jury could reasonably infer from this evidence that defendant did not intend for anyone to find or hear the child and that he intended her to die from exposure or lack of food and hydration. The State also offered evidence that defendant acted in order to avoid paying child support, a goal that a jury could reasonably infer could only be ensured by the death of the child. Based upon this circumstantial evidence, the trial court properly denied the motion to dismiss. *See, e.g., State v. Evangelista*, 319 N.C. 152, 158-59, 353 S.E.2d 375, 380-81 (1987) (holding that the evidence was sufficient to prove a specific intent to kill when the defendant barricaded himself in a railroad compartment with an eight-month-old infant, the defendant was warned that the child would dehydrate without water, and the defendant nonetheless consistently prevented attempts to provide the child with water for three days); *State v. Edwards*, 174 N.C. App. 490, 497-98, 621 S.E.2d 333, 338 (2005) (holding that evidence of a specific intent to kill was sufficient when, during the summer, the defendant left a baby in the sun in a remote location where he was unlikely to be found).

Defendant’s arguments regarding alternative interpretations of the evidence present questions of fact for the jury and do not support dismissal. This assignment of error is, therefore, overruled.

II

[2] Defendant next contends that the trial court committed plain error in allowing Battle to testify regarding defendant’s failure to respond to questions she asked him in letters. While defendant was awaiting trial, Battle wrote letters to defendant asking him why he had kidnapped their daughter. Battle testified that although

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defendant replied to the letters, he never answered the questions. Defendant argues that this testimony impermissibly referenced defendant's invocation of his right to remain silent after *Miranda* warnings had been given.

It is well established that "a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). As the United States Supreme Court first held in *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98, 96 S. Ct. 2240, 2245 (1976), the *Miranda* warnings contain an implicit assurance to a person who is given them that he will not be penalized for his post-arrest silence. "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.*

The rule set out in *Elmore* and *Doyle* does not, however, apply to the facts of this case. Battle's testimony did not reference any silence of defendant in response to questioning by law enforcement. *Miranda*'s protections apply only when "a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003). "Custodial interrogation" refers to "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *State v. Kincaid*, 147 N.C. App. 94, 101, 555 S.E.2d 294, 300 (2001) (quoting *State v. Clay*, 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979), *rev'd on other grounds by State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982)). *Miranda* is not implicated when a person is questioned by someone who is neither a law enforcement officer nor acting as an agent of law enforcement. *State v. Powell*, 340 N.C. 674, 687, 459 S.E.2d 219, 225 (1995) (concluding that no violation of *Miranda* occurred when private individuals, not acting as agents of the police, tape-recorded the defendant), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688, 116 S. Ct. 739 (1996); *In re Phillips*, 128 N.C. App. 732, 735, 497 S.E.2d 292, 294 ("[F]ree and voluntary statements made without *Miranda* warnings to private individuals unconnected with law enforcement are admissible at trial."), *disc. review denied*, 348 N.C. 283, 501 S.E.2d 919 (1998). Since the questions in this case were posed by Battle and the record contains no indication that Battle was acting at the behest of law enforcement, defendant's silence was not in response to a custodial interrogation. Accordingly, admission of

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testimony regarding that silence did not violate the assurances set out in the *Miranda* warnings. See *State v. Mitchell*, 317 N.C. 661, 667, 346 S.E.2d 458, 462 (1986) (“The prosecutor did not attempt to capitalize on the defendant’s reliance on the implicit assurances of the *Miranda* warnings, the concern embodied in the *Doyle* decision.”).

Additionally, even if *Miranda* were applicable, defendant chose not to remain silent. When Battle wrote to defendant, he voluntarily chose to write back. As our Supreme Court held in *Mitchell*, the principles set out in *Doyle* do not apply when “the defendant did not exercise his right to remain silent after receiving *Miranda* warnings,” but rather voluntarily spoke. *Id.* In that situation, the prosecutor may inquire about the defendant’s failure to disclose certain matters during that voluntary post-*Miranda* warnings conversation. *Id.* The trial court thus did not commit error in admitting Battle’s testimony about defendant’s responses to her letters.

III

[3] Defendant next argues that the State presented inconsistent theories at trial, violating his right to due process. Defendant points to the fact that the State argued throughout the trial that defendant was the child’s father, but then at sentencing told the court that there was no evidence presented that defendant was in fact the father and requested that defendant be required to register as a sex offender.

The State’s theory of this case was that defendant wanted to kidnap and kill the baby because he did not want to pay child support to Battle. Battle testified that defendant was the father of her child and multiple witnesses testified regarding defendant’s desire to avoid paying child support. No evidence was presented suggesting defendant was not the baby’s father. Nevertheless, following sentencing, the State argued to the trial court that defendant should “have to register as a sex offender being that he kidnapped a child and that there’s been no proof that he’s the parent of the child.” On the judgment, the trial court recommended that defendant be required to register as a sex offender.

“Equitable estoppel prevents one party from taking inconsistent positions in the same or different judicial proceedings, and ‘is an equitable doctrine designed to protect the integrity of the courts and the judicial process.’” *State v. Taylor*, 128 N.C. App. 394, 400, 496 S.E.2d 811, 815 (quoting *Medicare Rentals, Inc. v. Advanced Servs.*, 119 N.C. App. 767, 769, 460 S.E.2d 361, 363, *disc. review denied*,

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342 N.C. 415, 467 S.E.2d 700 (1995)), *aff'd per curiam*, 349 N.C. 219, 504 S.E.2d 785 (1998). Even assuming that the principle of judicial estoppel may be applied against the government in a criminal proceeding, the State's inconsistent positions in this case regarding paternity do not require a new trial. The State's theory throughout trial was that defendant was the father, and at no point did the State deviate from that position. It was only after trial and sentencing—and for the purpose of an entirely different statute, registration of sex offenders—did the State assert that there was no evidence of paternity. The inconsistent position only resulted in a “recommendation” by the trial judge that defendant be required to register as a sex offender. We can perceive of no prejudice with respect to the jury's verdict.

As held below, however, this case must be remanded for resentencing. Upon resentencing, the trial court should revisit the recommendation regarding registration. We note that the only evidence in the record indicates that defendant is the father of the kidnapped child. The State's assertion to the trial judge “that there's been no proof that he's the parent of that child” is incorrect. On this record, there is no basis for requiring defendant to register as a sex offender. The kidnapping of a child is deemed an offense against a minor only if the offense was not committed by a parent of the minor. N.C. Gen. Stat. § 14-208.6(1i) (2003).

IV

[4] While this case was on appeal, defendant filed two motions for appropriate relief arguing that his sentence violates the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), because the trial court imposed an aggravated sentence based on judicially-found facts. We agree.

Our Supreme Court addressed the impact of *Blakely* in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt.” *Id.* at 437, 615 S.E.2d at 265 (citing *Blakely*, 542 U.S. at 303-04, 159 L. Ed. 2d at 413-14, 124 S. Ct. at 2537; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455, 120 S. Ct. 2348, 2362 (2000)). The failure to do so constitutes structural error and is reversible *per se*. *Id.* at 449, 615 S.E.2d at 272.

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Because the trial court based defendant's sentence on an aggravating factor that it, rather than a jury, had found, we must vacate the sentence and remand for resentencing in accordance with *Blakely* and *Allen*. With respect, however, to defendant's argument that the aggravating factor should have been alleged in the indictment, the Supreme Court rejected that argument in *Allen*. *Id.* at 438, 615 S.E.2d at 265.

No error in part, reversed in part, and remanded for resentencing.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. CHANG YANG

No. COA04-1206

(Filed 6 December 2005)

1. Homicide— attempted voluntary manslaughter—valid offense

Defendant's contention that attempted voluntary manslaughter is not an offense was overruled; the Court of Appeals is without authority to ignore its own precedent.

2. Appeal and Error— invited error—drafting instructions

Defendant cannot complain on appeal about language in attempted voluntary manslaughter instructions where he helped draft the instructions and communicated to the trial court that he was satisfied.

3. Criminal Law— voluntary intoxication—instruction not given—no error

The failure to instruct on voluntary intoxication in an manslaughter and assault prosecution was not plain error where nothing in the record indicated that defendant was without the mental faculties to form the necessary mens rea.

4. Criminal Law— mutually exclusive convictions—assault with a deadly weapon and attempted voluntary manslaughter

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and attempted murder arising from

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a stabbing, convictions for assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter were mutually exclusive. Defendant either did or did not have the intent to kill at the time of the stabbing.

5. Constitutional Law— double jeopardy—convictions for assault with a deadly weapon and attempted voluntary manslaughter

Double jeopardy was violated by convictions for assault with a deadly weapon inflicting serious injury with intent to kill and attempted voluntary manslaughter. Where a felonious assault offense includes intent to kill as an element, attempted voluntary manslaughter is a lesser included offense of the assault.

6. Homicide— indictment—attempted voluntary manslaughter

Indictments were sufficient to support defendant's convictions for attempted voluntary manslaughter where they alleged that defendant "did unlawfully, willfully, and feloniously and of malice aforethought attempt to kill and murder [the victim and her father]."

7. Appeal and Error— invited error—drafting instruction—no prejudice—no plain error review

An instruction on self-defense was not reviewable as plain error where defendant helped create the instruction. Defendant invited any error and cannot now assert prejudice.

Appeal by defendant from judgments entered 20 April 2004 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 May 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant-appellant.

CALABRIA, Judge.

Chang Yang ("defendant") appeals from judgments entered on jury verdicts of guilty of two counts of attempted voluntary manslaughter, one count of assault with a deadly weapon inflicting serious injury, and one count of assault with a deadly weapon inflict-

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ing serious injury with intent to kill. We find no error in part, remand in part, and grant defendant a new trial in part.

The State presented evidence that defendant and Der Vang (the “victim”) met in July of 1999 and were married in a non-legal, traditional Hmong ceremony in July of 2002. Prior to the marriage, the couple experienced difficulties in the relationship, including a break-up from February of 2000 to May of 2000 and at least one instance of physical abuse by defendant. The victim also testified as to specific instances of violence. In October 2000, the victim attempted to break up with defendant, and he became angry. Because the victim was at work, she and defendant agreed to finish the discussion at her home. Defendant followed the victim home after work and began pushing and shoving her. Eventually, defendant pinned the victim down on her bed and would not let her up for approximately two to three hours until the victim’s brother arrived and convinced defendant to leave. During the incident, defendant threatened to kill himself if the victim left him.

In June of 2002, defendant and the victim were at his parents’ house, and defendant tried to convince the victim to sign her car over to him. When the victim refused and attempted to leave, defendant dragged her back inside the house, procured a gun, and threatened to kill himself and the victim. After defendant’s father disarmed him and his parents went to sleep, defendant took the keys to the victim’s car and tied her hands to his hands before they went to sleep to prevent her from leaving during the night. Another incident occurred that month when the victim did not wish to accompany defendant to his brother’s house. Defendant forced the victim into the car, and when she continued to protest, defendant threatened to cause an accident and kill them both. When they arrived at the house where defendant’s brother lived, defendant again procured a gun and threatened to kill himself and the victim if she left him.

On 28 September 2002, the victim’s family gathered to celebrate the birthday of Panhia Vang (“Vang”), the victim’s sister. Both Vang and the victim’s parents spent the night at defendant’s invitation. During the night, defendant awakened the victim because he was hungry and wanted money to purchase food. Defendant again awakened the victim when he returned and wanted to discuss their relationship. The victim refused to discuss the relationship with defendant because of the time and the presence of her parents in the nearby bedroom, causing defendant to become physically abusive, which resulted in the victim spitting up blood. The victim went to sleep on

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the floor in another bedroom where Vang and other family members were sleeping, but defendant followed her and tried to continue the discussion. Vang and the victim then went downstairs to sleep on the couch, and defendant again followed them.

At approximately six in the morning, defendant called his parents and asked them to come to the victim's house and help with their marital problems. Defendant, the victim, and their parents discussed the situation and agreed that defendant should leave with his parents. The parents further suggested going out for breakfast to continue the discussion, with everyone agreeing except defendant. All of the parents, except the victim's mother, went outside the house, and the victim went upstairs to get dressed. While the victim was changing, defendant came upstairs and locked the bedroom door, refusing to allow the victim to leave. The victim yelled out of the window for help from the parents. They came inside but could not get in the bedroom because of the locked door.

The victim struggled with defendant and was able to release the lock on the door. The parents forced their way in, but defendant grabbed the victim, with one arm wrapped around her neck, and pulled out a knife. Defendant began dragging the victim and, when she fell, he stabbed her. When her father tried to intervene, defendant began stabbing him as well. Subsequently, defendant dragged the victim to the top of the stairs, where he was hit by either the victim's mother or father, causing both him and the victim to fall down the stairs. At some point after falling down the stairs, the victim's father cut defendant's leg, and they subdued him and bound his hands with a cord. When the police arrived, defendant was being held down by his father.

Defendant testified in his own defense. Defendant testified he called his parents on 29 September 2002 because he was afraid for his life and was worried the victim would "do something to" him. He claimed the reason he went to the bedroom while the victim was changing was to convince her to go to his parents' house. He admitted to not allowing the victim to leave and causing her to call for help from the window but asserted he was the one who unlocked the bedroom door to let their parents into the room. After opening the door, the victim's father "rushed into the room" and punched him in the mouth, despite the fact that he had not injured the victim in any way. Then, defendant grabbed the victim and retreated.

When they reached the bathroom, defendant testified he saw a knife lying on the sink and began waving it at the victim's father

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because he feared further harm. Defendant asserted the victim's father "kind of back[ed] down a little bit and then he came back with a knife in his right hand." Defendant and the victim's father waved their knives at each other while defendant held the victim close to him and the victim had both hands around his waist, refusing to let go. Defendant pushed the victim away from him and pushed the victim's father to the ground but could not remember what he did with the knife. He could not explain how the victim and her father were stabbed. Defendant testified he was hit on the head at the top of the stairs and attacked after he fell down the stairs and was crawling away from the victim and her parents. As a result of the attack, defendant was subdued and bound until police arrived; however, defendant testified he was not being held down by his father. Defendant also testified he had taken ecstasy the night before, did not instigate any violence on the morning of 29 September, and had never physically harmed the victim.

Defendant was charged with two counts of attempted murder and two counts of assault with a deadly weapon inflicting serious injury with intent to kill on the victim and her father. At the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss all charges. The trial court denied defendant's motions, and the jury returned verdicts of two counts of attempted voluntary manslaughter, one count of assault with a deadly weapon inflicting serious injury on the victim's father and one count of assault with a deadly weapon inflicting serious injury with intent to kill on the victim. Defendant was sentenced to a minimum of 148 months to a maximum of 214 months in the North Carolina Department of Correction. Defendant appeals.

I. Attempted Voluntary Manslaughter

[1] In his first assignment of error, defendant "respectfully contends [*State v. Rainey*, 154 N.C. App. 282, 574 S.E.2d 25, *disc. rev. denied*, 356 N.C. 621, 575 S.E.2d 520 (2002)], recognizing attempted voluntary manslaughter as a criminal offense in North Carolina, was wrongly decided[;] [therefore, the] attempted voluntary manslaughter convictions must be vacated because the offense does not exist." This Court is without authority to ignore its own precedent, which is binding upon it unless overturned by a higher court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's argument is preserved for further appellate review and overruled.

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[2] In his next two assignments of error, defendant alternatively argues “the trial court committed plain error by submitting attempted voluntary manslaughter on the unavailable theory of imperfect self-defense” and by failing to instruct the jury on the essential elements of attempted voluntary manslaughter. However, the trial court stated that the instruction for the attempted murder convictions “was submitted to the Court” after “counsel for the parties, the State and the defendant, ha[d] endeavored to craft an amended version of [the attempted first-degree murder] pattern jury instruction” In addition, the following colloquy was contained in the transcript:

[THE STATE]: I would just like to put on the record that the State, the Court, and defense counsel spent about two hours or so hammering out the language of the attempted first-degree murder, self-defense, and attempted voluntary manslaughter instruction and that the parties were satisfied with that instruction as the Court intended to give it and gave it. . . .

THE COURT: Thank you, sir. . . .

[DEFENSE COUNSEL]: I have nothing to add, Your Honor.

Defendant helped draft and communicated to the trial court that he was satisfied with the instruction that was given, and error, if any, in the instruction was invited error. *See State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (noting that “a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review”). Defendant cannot now complain on appeal about the language in the instructions he helped craft at trial. These assignments of error are overruled.

II. Voluntary Intoxication

[3] In his fourth assignment of error, defendant asserts the trial court committed plain error in failing to instruct the jury on the defense of voluntary intoxication. “Under plain error review, ‘reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done[.]’ ” *State v. Miller*, 357 N.C. 583, 592, 588 S.E.2d 857, 864 (2003) (quoting *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002)), and, “absent the [claimed] error, the jury probably would have reached a different result.” *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). Defendant is limited to plain error review as a result of his failure to object at trial.

Voluntary intoxication is an affirmative defense that can be used to negate the *mens rea* required in certain criminal offenses. *State v.*

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Chapman, 359 N.C. 328, 378, 611 S.E.2d 794, 830 (2005). To raise the issue, however, a defendant must produce more than evidence of mere intoxication; he “must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form” the required *mens rea*. *Id.*, 359 N.C. at 378, 612 S.E.2d at 830 (citation and internal quotation marks omitted). In the instant case, there was some indication that defendant took ecstasy on 28 September 2002 in an effort to self-medicate his alleged depression. However, nothing in the record indicates that, at the time of the assaults, defendant was without the mental faculties to form the *mens rea* necessary to support the pending charges. The State’s theory of the case was that defendant was a controlling and abusive individual who used violence when faced with the prospect of losing the victim’s love and companionship. Defendant’s theory of the case was that he was defending himself from an unprovoked attack. Defendant has failed to show plain error on the part of the trial court in failing to instruct on the defense of voluntary intoxication. Accordingly, this assignment of error is overruled.

III. Mutual Exclusivity

[4] Defendant assigns error to the trial court’s entry of judgment on the charges of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter for stabbing the victim’s father on the grounds that these charges are mutually exclusive. Recently, this Court held that when a jury rejects the greater offense of assault with a deadly weapon inflicting serious injury with intent to kill in favor of the lesser-included offense of assault with a deadly weapon inflicting serious injury, the jury cannot convict a defendant of both the lesser-included offense and attempted murder upon the same victim because the offenses are mutually exclusive. *State v. Hames*, 170 N.C. App. 312, 320, 612 S.E.2d 408, 414-15 (2005), *disc. rev. denied*, 360 N.C. 70, 612 S.E.2d 408 (2005). In so doing, we reasoned that “by finding defendant guilty of the lesser-included offense of assault with a deadly weapon inflicting serious injury, the jury necessarily found that defendant did not have the ‘intent to kill’ [the victim] required to convict defendant of the greater offense of assault with a deadly weapon with intent to kill inflicting serious injury[,] [which was also submitted to the jury].” *Id.*, 170 N.C. App. at 322, 612 S.E.2d at 415. We went on to note that, “by subsequently finding defendant guilty of attempted voluntary manslaughter, the jury also necessarily found that defendant *had* the intent to kill [the victim.] *Id.* That precise situation is presented in the instant case. Either defend-

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ant did or did not have the intent to kill at the time he stabbed the victim's father, and the jury verdicts are mutually exclusive. As in *Hames*, we hold defendant is entitled to a new trial with respect to the stabbing of the victim's father. We additionally note the State has asserted *Hames* was incorrectly decided because jury verdicts convicting a defendant of attempted voluntary manslaughter and assault with a deadly weapon inflicting serious injury are merely inconsistent. The State's argument is preserved for further appeal and overruled.

IV. Double Jeopardy

[5] Next, defendant asserts the trial court erred by submitting to the jury both the attempted voluntary manslaughter charges and the felonious assault charges with respect to both the victim and her father and by imposing consecutive sentences for these offenses in violation of his state and federal constitutional rights to be free from double jeopardy. Since we have held that defendant is entitled to a new trial with respect to the charges against defendant for the altercation between him and the victim's father, we consider only defendant's assertion regarding the charges involving the victim.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also* N.C. Const. art. I, § 19. The Clause protects against, *inter alia*, multiple punishments for the same offense. *State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004), *cert. denied*, *Queen v. North Carolina*, — U.S. —, 161 L. Ed. 2d 285 (2005). The test for determining if a defendant has been impermissibly placed in double jeopardy involves examining whether the evidence required to support the two convictions is identical. "If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same." *Id.*, 358 N.C. at 579, 599 S.E.2d at 534 (citation and internal quotation marks omitted). "The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." *Id.* (citing N.C. Gen. Stat. § 14-32(a) (2003)).

The State concedes, and we agree, that where a felonious assault offense includes, as an element, the intent to kill, attempted voluntary manslaughter is a lesser included offense of the assault. Accordingly,

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we remand the convictions to the trial court with respect to the victim to allow the trial court to arrest the judgment on the conviction for attempted voluntary manslaughter.

V. Indictment

[6] In his next assignment of error, defendant asserts his convictions for attempted voluntary manslaughter must be vacated because they are not supported by the indictments. Specifically, defendant argues the indictments fail to sufficiently allege attempted first-degree murder or attempted voluntary manslaughter. The language of the indictments for both the victim and her father is as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 29th day of September, 2002, in Mecklenburg County, [defendant] did unlawfully, willfully, and feloniously and of malice aforethought attempt to kill and murder [the victim and her father].

In *State v. Bullock*, 154 N.C. App. 234, 244, 574 S.E.2d 17, 23 (2002), this Court considered an indictment for attempted first-degree murder that read as follows: “[t]he jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to kill and murder Yvonne Bullock.” Because the indictment lacked the phrase “malice aforethought,” we held the indictment failed to properly allege attempted first-degree murder. *Id.*, 154 N.C. App. at 244, 574 S.E.2d at 23. However, this Court went on to note that the indictment did sufficiently allege the lesser-included offense of attempted voluntary manslaughter, notwithstanding the lack of the phrase “malice aforethought.” *Id.*, 154 N.C. App. at 245, 574 S.E.2d at 24. The indictment in the instant case is identical to that considered in *Bullock* except, here, it does set forth that defendant acted with “malice aforethought.” As in *Bullock*, the indictments were sufficient to charge attempted voluntary manslaughter, and this assignment of error is overruled.

VI. Self-Defense

[7] In his final assignment of error, defendant asserts “the trial court instructed on self-defense in all four cases[,] [but] the trial court’s self-defense instructions were erroneously incomplete because they failed to instruct on the ‘castle doctrine’ and defense of habitation.” Defendant again assigns plain error because he did not object at trial.

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As noted previously, however, plain error review is not available in the instant case because the given self-defense instruction was one defendant helped create. As with the previous assignments of error involving such instructions, defendant invited the error, if any, and cannot now assert he was prejudiced thereby. This assignment of error is overruled.

No error in part, new trial in part, and remanded in part.

Judges MCGEE and ELMORE concur.

KAREN ANN BLANKENSHIP AND MIKE THOMPSON, PLAINTIFFS v. TOWN AND
COUNTRY FORD, INC., DEFENDANT

No. COA04-702

(Filed 6 December 2005)

1. Pleadings— information and belief—admitted by default judgment

There is no North Carolina law to preclude the entry of default judgment where the allegations are based on information and belief. Here, the trial court did not err by finding on remand that defendant had admitted the allegations in plaintiff's complaint; in addition to the complaint, plaintiff submitted sworn affidavits and the court heard evidence from experts on both sides.

2. Discovery— limited by court—no abuse of discretion

After entry of default, the defendant is deemed to have admitted the allegations of the complaint. Here, the trial court did not abuse its discretion by limiting discovery after remand of a default judgment in an action involving a used car with prior damage alleged to be undisclosed.

3. Trial— remand—evidence limited to damages

The trial court did not err by limiting the evidence to damages on a hearing after remand of a default judgment. The court made the required findings that defendant had violated the relevant statutes (based on allegations deemed admitted by the default), and those findings were supported by plaintiffs' affidavits as

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well as evidence introduced at the hearing. Moreover, defendant did not show prejudice.

4. Damages and Remedies—damaged used car—double recovery—election of remedies required

The trial court erred in an action involving a used car by awarding plaintiffs treble damages under both N.C.G.S. § 20-348(a) and Chapter 75. The applicable statutes do not contain language authorizing multiple recoveries; plaintiffs are required to elect their remedy.

5. Damages and Remedies—damaged used car—use of vehicle

The trial court did not err when calculating damages for a used car sold with an undisclosed collision by refusing to offset the value plaintiffs received from use of the vehicle. The court's decision is supported by *Taylor v. Volvo North America Corp.*, 339 N.C. 238.

6. Costs—attorney fees—findings—no abuse of discretion

The trial court made the requisite findings and did not abuse its discretion when awarding attorney fees pursuant to N.C.G.S. § 20-348(a)(2) and N.C.G.S. § 75-16.1.

Defendant appeals from judgment entered 3 October 2003 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 March 2005.

David Q. Burgess, for plaintiff-appellee.

Parker Poe Adams & Bernstein, L.L.P., by Michael S. Malloy and William L. Esser, IV, for defendant-appellant.

HUDSON, Judge.

In April 2001, plaintiffs brought suit against defendant for claims arising from defendant's failure to disclose prior damage to a used car defendant sold to plaintiffs. Upon plaintiffs' motion, the trial court entered default judgment against defendant in August 2001 and awarded trebled compensatory damages and attorney fees to plaintiffs. This Court entered an opinion on 31 December 2002, which affirmed in part and reversed in part. *Blankenship v. Town and Country Ford*, 155 N.C. App. 161, 574 S.E.2d 132 (2002), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 384 (2003) (*Blankenship I*). The trial court heard the remanded case on 2 September 2003 and entered

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judgment on 3 October 2003, finding that defendant's conduct did violate the statutes in question and again awarding trebled compensatory damages and attorney fees. Defendant appeals. For the reasons discussed below, we affirm in part, and vacate and remand in part.

The evidence tends to show that on 1 March 2000, defendant bought a used 1999 Chevrolet Cavalier (the vehicle) at an auto auction. Defendant then sold the vehicle to plaintiff Blankenship for \$12,566 "as is." Defendant provided a "Damage Disclosure Statement" as required by North Carolina law and answered "no" to the question of whether the vehicle had "been damaged by collision or other occurrence to the extent that damages exceed 25% of its value at the time of the collision or other occurrence." After purchase, plaintiffs began to experience numerous problems with the vehicle, including a popping sound coming from the right front during left turns, a "right pull" during left turns, a radiator leak, water leaking into the trunk, and a door that was difficult to open. In February 2001, plaintiff Thompson took the vehicle to Spruill Chevrolet-General Motors, where the technician documented "physical damage to rear of car—bondo [a patching material] in side trunk," and "physical damage to front of car, fenders, bolts loose, etc."

Plaintiffs filed a complaint against defendant on 5 April 2001. Plaintiffs alleged that defendant violated the Motor Vehicle Act, N.C. Gen. Stat. § 20-71.4, by failing to disclose that the vehicle sustained damage in a collision in excess of 25% of its value; that such failure to disclose constituted an unfair and deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1; and that defendant's failure to disclose was committed with "intent to defraud," thus giving rise to a claim under N.C. Gen. Stat. § 20-348(a). Defendant failed to respond to plaintiffs' complaint and default judgment was entered on 6 August 2001, for \$55,281, which consisted of damages trebled under §§ 75-16 and 20-348(a), plus attorney fees. As discussed, this Court then remanded the case after defendant's first appeal. On remand, the trial court limited the evidence on remand to the issue of damages, as it concluded that defendant had admitted liability with the entry of default judgment. It heard evidence from experts for both parties regarding the value of the car and the amount of damages. The trial court found that defendant's conduct violated both statutes and again awarded trebled damages and attorney fees, totaling \$79,983.

In its brief, defendant first contends that the trial court erred by refusing to allow it a hearing regarding whether its conduct violated

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the various statutes. Defendant next contends that the trial court erred in finding that defendant admitted the allegations of plaintiffs' complaint as a result of the entry of default judgment. We disagree with both arguments and address defendant's second argument first.

[1] When default is entered due to defendant's failure to answer, as here, "the substantive allegations raised by plaintiff's complaint are no longer in issue, and, for the purposes of entry of default and default judgment, are deemed admitted." *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980) (internal citation omitted). Here, on remand, the trial court adopted plaintiffs' complaint by reference and made it part of the findings of fact, "word for word." Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410, *cert. denied*, 278 N.C. 701, 181 S.E.2d 602 (1971); *Norton v. Sawyer*, 30 N.C. App. 420, 422, 227 S.E.2d 148, 151, *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976).

Defendant contends that the trial court's adoption of plaintiffs' complaint was improper because the complaint was based upon information and belief and only "well-pled factual allegations" are admitted by default. However, defendant cites no North Carolina law in support of this argument. Although defendant cites cases from other jurisdictions, our research reveals no North Carolina statutes or caselaw which preclude a trial court from entering default where the allegations are based upon information and belief. Furthermore, in addition to the plaintiffs' complaint, the plaintiffs submitted sworn affidavits, and the trial court heard evidence on remand from experts on both sides regarding the damage to the vehicle. We conclude that the trial court's findings of fact are supported by competent evidence.

[2] Defendant also asserts that the trial court "refused to permit a hearing" and did not comply with the mandate of this Court because it denied defendant's request for discovery and its attempts to introduce certain evidence. We disagree. This Court stated:

[W]e remand this case to the trial court for a determination and findings as to whether defendant's conduct amounts to an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1 and a violation of N.C. Gen. Stat. § 20-71.4, as well as an intent to defraud under N.C. Gen. Stat. § 20-348(a)(1). On remand, plaintiffs and defendant may present evidence on issues relating to damages under the applicable statutes.

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Blankenship I, 155 N.C. App. at 168, 579 S.E.2d at 136. On remand, defendant requested discovery and plaintiffs filed a protective order in response. The trial court allowed discovery “solely on the issues of whether Defendant’s conduct amounts to an unfair or deceptive trade practice under N.C. Gen. Stat. § 75-1.1 and a violation of N.C. Gen. Stat. § 20-71.4 with intent to defraud under N.C. Gen. Stat. § 20-348(a)(1).”

“It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion.” *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 264-65 (1977) (internal citation omitted). Rule 26(b)(1) of the Rules of Civil Procedure provides that a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]” N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2003). As discussed, after an entry of default against a defendant, he or she “is deemed to have admitted the allegations in plaintiff’s complaint, and is prohibited from defending on the merits of the case.” *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991) (citing N.C. Gen. Stat. § 1A-1, Rule 8(d)) (internal citation omitted). We conclude that the trial court did not abuse its discretion in limiting discovery.

[3] Defendant also contends that the trial court erred by refusing to allow it to present evidence regarding whether its conduct violated the statutes at issue, but was only allowed to introduce evidence regarding compensatory damages. The trial court stated that the hearing would be limited to evidence regarding damages, as the issue of liability had already been decided. We remanded for findings of fact regarding whether defendant’s conduct violated the statutes. On remand, the trial court made such findings, based on the plaintiffs’ allegations which were deemed admitted upon defendant’s default, as discussed above. As discussed, the trial court’s findings of fact here are binding on appeal if supported by any competent evidence. Our review of the record, specifically the affidavits of plaintiffs in support of their motion for judgment by default, as well as the evidence introduced at the hearing on remand, indicate competent evidence supports the trial court’s findings of fact. Thus, these findings are conclusive on appeal.

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We conclude that the trial court was not required to take further evidence on these matters. Indeed, this Court explicitly stated that on remand the parties could present evidence regarding damages, which is what the court did. Furthermore, in their argument regarding the exclusion of evidence, defendant fails to show prejudice. In a civil case such as this

not every erroneous ruling on the admissibility of evidence . . . will result in a new trial. The moving party has the burden to show not only that the trial court erred, but also to show that he or she was prejudiced and that a different result would have likely resulted had the error not have occurred.

Bowers v. Olf, 122 N.C. App. 421, 427, 470 S.E.2d 346, 350 (1996) (ellipses in original) (internal citations and quotation marks omitted). Defendant has shown no prejudice.

[4] Defendant also contends that the trial court erred in awarding plaintiffs treble damages under both N.C. Gen. Stat. § 20-348(a) and again under Chapter 75. We agree. In *Blankenship I*, this Court remanded to the trial court for findings of fact so that this Court could determine whether damages were appropriate under the applicable statutes but did not decide whether multiple awards of treble damages were permissible. Now that the trial court has made findings of fact that defendant's conduct violated both statutes, we must address whether plaintiffs may recover damages under both statutes.

Defendant argues that the trial court awarded damages to plaintiffs twice for the same wrong and that plaintiffs are not entitled to "double recovery." In *United Laboratories v. Kuykendall*, the North Carolina Supreme Court held that pursuant to the doctrine of election of remedies, a party may not recover twice based on the same conduct. 335 N.C. 183, 191, 437, S.E.2d 374, 379 (1993).

Where the same source of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both.

Id. (internal citation omitted). Although *Kuykendall* involved a common law and a Chapter 75 claim, our Supreme Court has also held that in a case involving a statutory violation and an unfair and deceptive trade practice claim plaintiff faces an election of remedies for

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recovery based upon the same conduct or transaction. *Stanley v. Moore*, 339 N.C. 717, 724, 454 S.E.2d 225, 229 (1995). Here, the Court's conclusions of law reveal that the Court awarded damages and treble damages for the same conduct:

[Defendant] failed to disclose in writing to the Plaintiffs before the time of transfer that the automobile had been involved in a collision or occurrence involving the vehicle resulting in twenty-five percent (25%) of its fair market value.

The court then concluded that this conduct violated N.C. Gen. Stat. § 20-71.4(a) and also N.C. Gen. Stat. § 75.1.1 and awarded treble damages pursuant to each statute.

Plaintiffs argue that *Wilson v. Sutton*, 124 N.C. App. 170, 476 S.E.2d 467 (1996), and *Washburn v. Vandiver*, 93 N.C. App. 657, 379 S.E.2d 65 (1989), control here. However, we conclude that neither case controls. In *Wilson*, the Court addressed whether the trial court erred in denying defendant's motion for judgment notwithstanding the verdict, not whether the trial court's awards of treble damages were permissible. *Id.* In *Washburn*, the Court upheld multiple awards based on N.C. Gen. Stat. § 20-348, which specifically authorized state statutory remedies in addition to federal odometer law remedies. 93 N.C. App. at 663, 379 S.E.2d at 69. Here, the applicable statutes contain no similar language authorizing multiple recoveries. We conclude that plaintiffs were required to elect between the two remedies and we therefore vacate this portion of the trial court's order and remand for the plaintiffs to elect between the two awards.

[5] Defendant also contends that the trial court erred in refusing to offset the value plaintiffs received from use of the vehicle against the award of damages. As this is a matter of law, we review this contention *de novo*. At the time of the hearing, plaintiffs had driven the vehicle 87,000 miles since their purchase. The trial court calculated damages by calculating the difference between the amount paid and the vehicle's actual value, but did not offset the amount by the plaintiffs' use. Defendant cites *Taylor v. Volvo North America Corp.* in support of its argument that the court was required to offset for use. 339 N.C. 238, 451 S.E.2d 618 (1994). However, we read *Taylor* as supporting the actions of the trial court here. We note that *Taylor* involved the Warranties Act, N.C. Gen. Stat. § 20-351, and a leased car, rather than Chapter 75 and an owned vehicle, as here. *Id.* But *Taylor* did address the calculation of damages, holding that any benefit received must be deducted before trebling damages. *Id.* at 261, 451

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S.E.2d at 631. And, in *Taylor*, the Court held that the benefit received was usage, as the car was leased. *Id.* However, the Court noted that in a case where the car is owned, the benefit is the value of the car. *Id.* (citing *Washburn*). Thus, under *Taylor*, the trial court calculated damages correctly here.

[6] Finally, defendant argues that the trial court erred in awarding unreasonable attorney fees. The trial court here awarded attorney fees to plaintiff pursuant to N.C. Gen. Stat. §§ 20-348(a)(2) and 75-16.1. Under N.C. Gen. Stat. § 75-16.1, a prevailing party may recover a reasonable attorney fee upon a finding by the trial court that “the party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit. . . .” N.C. Gen. Stat. § 75-16.1; *Barbee v. Atlantic Marine Sales & Serv.*, 115 N.C. App. 641, 648, 446 S.E.2d 117, 121, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994). The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial judge. *Barbee* at 648, 446 S.E.2d at 121. And if fees are awarded, the amount also rests within the discretion of the trial court and we review such awards for abuse of discretion. *Shumaker v. Shumaker*, 137 N.C. App. 72, 78, 527 S.E.2d 55, 59 (2000). However, when awarding fees pursuant to N.C. Gen. Stat. § 75-16.1, the court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that it refused to resolve the matter fully, and that the attorney fee was reasonable. *Barbee* at 648, 446 S.E.2d at 121-22. Here, the court made such findings. On appeal, the record must also contain findings regarding the attorney fees, such as: “findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney.” *Id.* (internal citations omitted). Our review of the record reveals that the trial court made the requisite findings and we conclude that it did not abuse its discretion.

Affirmed in part.

Vacated and remanded in part.

Judges WYNN and STEELMAN concur.

STATE v. CUMMINGS

[174 N.C. App. 772 (2005)]

STATE OF NORTH CAROLINA v. MARVIN ANTHONY CUMMINGS, DEFENDANT

No. COA05-188

(Filed 6 December 2005)

1. Appeal and Error— preservation of issues—failure to argue

Although defendant contends the trial court committed plain error in a multiple breaking and entering, multiple larceny, and safecracking case by failing to consider mitigating factors during sentencing, defendant waived appellate review of this issue because defendant failed to make any argument in his brief regarding the prejudicial impact of the alleged plain error. Further, *Blakely v. Washington*, 542 U.S. 296 (2004), does not apply to this case since defendant was sentenced within the presumptive range.

2. Sentencing— enhancement—habitual felon status—not cruel and unusual punishment

Although defendant contends the trial court's use of defendant's felony convictions to enhance his sentence under the habitual felon statutes constituted cruel and unusual punishment in violation of defendant's Eighth Amendment rights, this assignment of error is overruled because the Court of Appeals and the North Carolina Supreme Court have consistently rejected Eighth Amendment challenges to habitual felon sentences.

3. Appeal and Error— preservation of issues—failure to object—failure to cite authority

Although defendant contends the sentence imposed by the trial court in a multiple breaking and entering, multiple larceny, and safecracking case violated sentencing policies established by the legislature and violated defendant's due process rights, this assignment of error is overruled because: (1) defendant failed to object at trial and thus failed to properly preserve this issue for appellate review; and (2) defendant failed to cite any authority in his appellate brief to support this argument.

4. Constitutional Law— effective assistance of counsel—failure to object—failure to show prejudice

Defendant did not receive ineffective assistance of counsel in a multiple breaking and entering, multiple larceny, and safecracking case based on his counsel's failure to object to defendant's sentence as a violation of the Eighth Amendment and on

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grounds of legislative policy considerations, because assuming arguendo that defense counsel's performance may have been deficient based on his failure to object during defendant's sentencing hearing, defendant failed to show how he was prejudiced when his counsel negotiated a plea arrangement wherein defendant's additional twenty-one felony offenses were consolidated for judgment with the original ten felony offenses such that defendant received no additional time for the twenty-one felonies.

Appeal by defendant from judgments consistent with jury verdicts entered 18 August 2004 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 12 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Bruce T. Cunningham, Jr. for defendant.

BRYANT, Judge.

Marvin Anthony Cummings (defendant) appeals from judgments consistent with jury verdicts entered 18 August 2004 convicting him of four counts of breaking and entering and larceny; two counts of safecracking; and attaining the status of an habitual felon.

The State's evidence tended to show that in the early morning hours of 3 October 2002, defendant broke into the Carousel Cinema in Greensboro. Defendant pried open the cinema's back door to gain entry. Once inside, defendant knocked over an ATM machine that was bolted to the floor, dragged it twenty-five feet until it was out of sight, and ripped apart the ATM and stole approximately \$3,700.00 to \$3,800.00. Shoe prints, later determined to be consistent with defendant's, were observed on the ATM and in the hallway.

In the early morning hours of 12 November 2002, defendant broke into Harper's II Gentleman's Club in Greensboro. Defendant pried off exterior paneling and broke through the inside paneling of the building to the business. Once inside, defendant caused \$250.00 worth of damage to the cash register and stole approximately eighty dollars worth of rolled quarters from behind the bar. The responding officer noticed shoe prints on paneling lying inside the business. The shoe prints were later determined to be consistent with defendant's shoes.

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In the early morning hours of 18 October 2002 defendant broke into a Sprint store in Greensboro. Defendant pried open the back door of a vacant space next to the Sprint store. Defendant knocked a hole in the wall in the sheetrock between the Sprint store and an adjacent suite to gain access to the Sprint store. Once inside, defendant stopped the video security system and ejected the videotape. Defendant attempted to break into the company's safe, however, he was unsuccessful. Defendant then stole a laptop belonging to Sprint, a tote bag belonging to an employee, twenty-one telephone handsets and five DVD players. Defendant tripped the motion sensor alarm and the manager of Sprint store and the police were called to the scene. The manager determined defendant stole \$4,533.90 worth of equipment as well as a computer and the manager's personal property. Shoe prints later determined to be consistent with defendant's, were found at the scene. Police officers discovered the security videotape just outside the hole in the vacant office space.

In the early morning hours of 20 December 2002 defendant broke into the same Sprint store, using the same method of entry. After defendant entered, he turned off the lights, stopped the video security system and took the videotape. Defendant pried open the store's safe and stole \$9,254.73. Defendant also stole a computer, a backpack, a tote bag and the manager's personal items. After the break-in, Officer Justin Blanks of the Greensboro Police Department noticed a man wearing all black walking across a parking lot carrying a tote bag and backpack.

After Officer Blanks approached to investigate, defendant ran, dropped the tote bag and Officer Blanks pursued. Other officers arrived to assist, but defendant escaped. In the tote bag, the officers found a computer, mail belonging to the manager of the Sprint store, and the store's surveillance videotape. The officers discovered a blue Ford Explorer parked along the woods that was registered to defendant and had been recently operated. A short time later, defendant exited the woods with a flashlight and entered the Explorer. Officer Blanks then attempted to conduct a traffic stop. Defendant drove off and a vehicle chase ensued. Defendant drove behind a business and exited his vehicle. Defendant grabbed his backpack and exited the car. Officer Blanks followed defendant who jumped a fence. The officer drew his gun and told defendant to stop; however, defendant continued to run. A search of the Explorer discovered receipts from the Sprint store and defendant's driver's license. Officer Blanks identified the person on the driver's license as the person he had just chased

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and was consistent with the person seen on the videotape breaking into the Sprint store.

Based on a call from police, the manager of the Sprint store came to the scene and found defendant had again broken into the store. The manager found defendant was a customer as his name (from his driver's license) was in the store's computer. It was also discovered defendant's cell phone was in use while they were in the store, about the same time as the foot chase. Upon request of the officers, the manager first disconnected defendant's cell phone service and then restored service so officers could attempt to contact defendant. When the officers were unsuccessful in contacting defendant, the manager permanently disconnected defendant's cell service. Later that day, defendant came into the Sprint store and asked why his cell phone had been disconnected. The store manager replied defendant's service was terminated because defendant had broken into the store. Defendant was silent, turned around, and left.

Defendant was sentenced to ten consecutive sentences of 168 to 211 months imprisonment and sentenced as an habitual felon. Defendant then entered an *Alford* plea of guilty to the following additional charges: nine counts of felony breaking and entering; nine counts of felony larceny; and two counts of felony possession of stolen goods. The parties agreed that the additional twenty-one felony charges would be consolidated for judgment and run concurrent with any other sentence defendant was serving. The trial court then imposed a judgment pursuant to the plea arrangement.

On appeal, defendant raises the following issues¹: (I) whether the trial court committed plain error by failing to consider factors in mitigation when sentencing defendant; (II) whether the trial court erred in sentencing defendant in violation of the Eighth and Fourteenth Amendments; (III) whether the trial court violated criminal sentencing policies established by the legislature; and (IV) whether defendant received ineffective assistance of counsel at trial.

I

[1] Defendant contends the trial court committed plain error in sentencing by failing to consider factors in mitigation. Furthermore, defendant argues the holding in *Blakely v. Washington* requires the trial court to find factors in mitigation. *Blakely v. Washington*, 542

1. We note that we have reviewed and denied defendant's Motion for Appropriate Relief.

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U.S. 296, 159 L. Ed. 2d 403 (2004). However, *Blakely* does not apply to this case, as defendant was sentenced within the presumptive range. However, the State argues, and we agree defendant has waived appellate review of this issue.

“[E]rror may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion.” N.C. Gen. Stat. § 15A-1446(a) (2003). This Court has found “the [a]ppellate courts will not consider constitutional questions that were not raised and decided at trial.” *State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 397, 547 S.E.2d 430 (2001).

Defendant states in his brief that “[d]efendant asserts plain error,” however, defendant does not make any argument in his brief to this Court regarding the prejudicial impact of the alleged plain error. Accordingly, the issue of whether any alleged errors resulted in plain error pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure is not properly before this Court. *See State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000) (“Defendant’s empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule.”). This assignment of error is overruled.

II

[2] Defendant next argues his felony convictions (enhanced under the habitual felon statutes) are cruel and unusual punishment and violate his Eighth Amendment rights. This Court and the North Carolina Supreme Court have consistently rejected Eighth Amendment challenges to habitual felon sentences. *State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417, *disc. rev. denied*, 357 N.C. 167, 581 S.E.2d 64 (2003) (the defendant was sentenced to 90 to 117 months based on attaining the status of an habitual felon for the commission of a Class H felony); *State v. Clifton*, 158 N.C. App. 88, 580 S.E.2d 40 (the defendant was sentenced to two consecutive terms of a minimum of 168 to a maximum of 211 months under the habitual felon statutes for the commission of two non-violent substantive Class H felonies), *disc. rev. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003). This assignment of error is overruled.

III

[3] Defendant contends the sentence imposed by the trial court violated sentencing policies established by the legislature and violated

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[122 N.C. App. 1 (1996)]

defendant's due process rights. We note however, that defendant failed to object at trial and therefore has failed to properly preserve this issue for review on appeal. Further, defendant has failed to cite to any authority in his appellate brief in support of this argument. *See State v. Mack*, 161 N.C. App. 595, 589 S.E.2d 168 (2003) (trial court judgment affirmed where the defendant failed to preserve a question for appellate review in violation of N.C. R. App. P. 10(b)(1) and the defendant failed to cite authority in his brief in violation of N.C. R. App. P. 28(b)(6)). This assignment of error is overruled.

IV

[4] We now address defendant's claim for ineffective assistance of counsel (IAC) which is interspersed among each of defendant's assignments of error. Defendant alleges trial counsel's failure to object to defendant's sentence as a violation of the Eighth Amendment and on grounds of legislative policy considerations constitute IAC. We disagree.

To prevail on his IAC claim defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Defendant must satisfy the following two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell at 562, 324 S.E.2d at 248 (quotation omitted). "[E]ven an unreasonable error . . . does not warrant reversal . . . unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

Assuming *arguendo* defense counsel's performance may have been deficient for failing to object during defendant's sentencing hearing, defendant has failed to show he was prejudiced. Four cases were joined for trial and defendant was sentenced after his conviction of ten felony offenses. The legislature has defined the purpose of sentencing:

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[174 N.C. App. 778 (2005)]

The primary purposes of sentencing a person convicted of a crime are to impose punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C. Gen. Stat. § 15A-1340.12 (2003). Defendant was sentenced within the presumptive range as a Level "VI" Habitual Felon. Following sentencing on the offenses comprising the jury verdict, defendant pled guilty to an additional twenty-one felony offenses including nine counts each of breaking and entering, felony larceny and two counts of possession of stolen goods. Pursuant to the plea arrangements, defendant's additional twenty-one felony offenses were consolidated for judgment with the original ten felony offenses, such that defendant received no additional time for these twenty-one felonies. Defendant's counsel seems to have obtained a very favorable plea bargain for defendant. Defendant has failed to show he was prejudiced. This assignment of error is overruled.

No error.

Judges HUDSON and CALABRIA concur.

TERRILYNNE WALKER, PLAINTIFF V. WAYNE CHARLES WALKER, AND
GARY S. WALKER, DEFENDANTS

No. COA04-1601

(Filed 6 December 2005)

Appeal and Error— preservation of issues—appellate rules violations

Defendant's appeal from a judgment ordering specific performance of a separation agreement and of an amendment to the agreement is dismissed because defendant failed to properly preserve for appellate review the issues presented on appeal when he violated several rules of appellate procedure.

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[174 N.C. App. 778 (2005)]

Appeal by defendant from judgment entered 13 July 2004 by Judge William M. Neely in Moore County District Court. Heard in the Court of Appeals 13 September 2005.

Smith Debnam Narron Wyche Saintsing & Myers, L.L.P., by John W. Narron and Lynn Wilson Lupton, for plaintiff-appellee.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for defendant-appellant.

LEVINSON, Judge.

Defendant Wayne Walker appeals from a judgment ordering specific performance of the separation agreement executed by defendant and plaintiff Terrilynne Walker, and of an amendment to the agreement. We dismiss the appeal.

The parties were married in 1965, and separated in early 2000. Shortly before separating, they started two businesses—Capital Transaction Group, Inc. (CapTran), and Carolina Self Storage, Corp. (CSS). Defendant's brother, Gary Walker, provided funding for both projects. On 28 February 2000 plaintiff and defendant executed a separation agreement addressing child custody and support, alimony, and division of marital property. On 25 September 2000 the parties signed an Amendment to the separation agreement; plaintiff sold her CapTran stock to Gary Walker, and relinquished her voting rights in defendant's CSS stock.

On 29 January 2001 plaintiff filed suit against defendant for breach of the separation agreement. Plaintiff alleged that the separation agreement required defendant to pay plaintiff one half of the \$500,000 he had received in an arbitration proceeding, and that he was refusing to pay her. Defendant filed an answer and counterclaim on 26 March 2001. He denied plaintiff's entitlement to specific performance of the separation agreement, and asserted that the amendment was void *ab initio*, on the grounds that it was improperly executed. In his counterclaim, defendant sought, *inter alia*, to have the court (1) dismiss plaintiff's complaint; (2) set aside the separation agreement and amendment, on grounds of coercion and duress; and (3) declare the amendment void based on its improper execution. In her reply, plaintiff denied the allegations of the counterclaim, and asserted that defendant was estopped from arguing that the amendment was invalid. Plaintiff asked the court to dismiss defendant's counterclaim, and to enforce both the separation agreement and amendment.

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In March 2002, defendant filed a motion for partial summary judgment. In June 2002 the trial court granted summary judgment for defendant on the issue of the amendment's improper execution, but denied summary judgment on the issue of estoppel. Defendant filed another summary judgment motion in July 2002, which was denied in November 2002. In July 2001 plaintiff amended her complaint to add two defendants, Gary Walker and CapTran. Before trial, plaintiff dismissed her claim against CapTran. On 12 July 2002 defendant filed a notice of voluntary dismissal of the part of his counterclaim seeking to have the separation agreement set aside; he did not dismiss his counterclaim to have the amendment set aside. On 14 August 2002 plaintiff dismissed her original complaint against defendant.

Following an October 2003 bench trial on defendant's counterclaim, the trial court on 13 July 2004 entered judgment in favor of plaintiff. The judgment ordered defendant to specifically perform and comply with the terms of the separation agreement and of the amendment. Defendant timely appealed from this order and from the orders denying his pretrial motions for summary judgment. The court also dismissed plaintiff's claims against defendant Gary Walker, who is not a party to this appeal.

We first review certain provisions of N.C. R. App. P. 10:

- (a) . . . [T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. . . .
- (c) (1) . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned.

N.C.R. App. P. 10(a) and (c)(1). "One purpose of this rule is to 'identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position.'" *State v. Baggett & Penuel*, 133 N.C. App. 47, 48, 514 S.E.2d 536, 537 (1999) (quoting *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988)). "In addition, Rule 10 allows our appellate courts to 'fairly and expeditiously' review the assignments of error without making a 'voyage of discovery' through the record in order to determine the legal questions involved." *Rogers v. Colpitts*, 129 N.C. App. 421, 422, 499 S.E.2d 789, 790 (1998) (quoting *Kimmel*, 92 N.C. App. at 335, 374

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S.E.2d at 437). Furthermore, “assignments of error [that are] . . . broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure[.]” *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002). Moreover, it is long settled that the “scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant’s brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.” *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (citation omitted) (emphasis added).

We next apply these principles to the instant case. The defendant set out 119 assignments of error, purporting to assign error to almost every finding of fact and conclusion of law made by the trial court. His assignments of error follow a repetitive pattern, with each finding or conclusion the subject of three identical assignments of error.¹ Thus, assignments of error directed at findings of fact all assign error to:

- a. The Trial Court’s Finding of Fact [No. ‘X’], on the grounds that it is not supported by the evidence.
- b. The Trial Court’s Finding of Fact [No. ‘X’], on the grounds that it is erroneous as a matter of law.
- c. The Trial Court’s Finding of Fact [No. ‘X’], on the grounds that it is an abuse of discretion.

Assignments of error directed to conclusions of law use the same phrasing, adding only that the specific conclusion of law is not supported by the Findings of Fact. Likewise, assignments of error directed at decretal paragraphs of the order track the language of defendant’s challenges to conclusions of law, adding only that the specific decretal paragraphs are not supported by the Conclusions of Law.

There is nothing inherently incorrect about categories ‘a’ and ‘c’ of defendant’s assignments of error. These assignments of error clearly preserve for appellate review the issues stated therein—the trial court’s exercise of discretion and the sufficiency of the evidence to support evidentiary facts found by the trial court. However, these issues are not raised by defendant on appeal. In his appellate brief, defendant does not argue that the trial court abused its discretion.

1. The only exceptions are assignments of error numbers 112-116, which assign error to the admission of certain evidence.

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Nor is defendant's appeal based on the assertion that evidentiary facts were not proven or supported.² Under N.C. R. App. P. 28, "[q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned[.]" and "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28 (a) and (b)(6). Thus, defendant's assignments of error to the trial court's exercise of discretion and to the evidentiary support for the findings of fact are deemed abandoned.

We next consider, in the context of the issues actually briefed on appeal, the defendant's assignments of error in category 'b', asserting that various rulings by the trial court were "erroneous as a matter of law." Defendant argues on appeal that the trial court erred by (1) ordering specific performance of the separation agreement and its amendment, in the absence of a pending claim for breach of contract; (2) ruling that defendant was equitably estopped from challenging the validity of the amendment; and (3) denying his pretrial motions for summary judgment. We conclude that these issues are not preserved for appellate review.

Defendant's assertion that a given finding, conclusion, or ruling was "erroneous as a matter of law" completely fails to identify the issues actually briefed on appeal. These assignments of error do not refer to specific performance, equitable estoppel, the existence of genuine issues of material fact, the proper interpretation of the North Carolina Rules of Civil Procedure, the requirements for a valid separation agreement, incorporation by an amendment of an earlier agreement, breach of contract, effect of voluntary dismissal of a claim on related pending claims and counterclaims, enforcement of separation

2. In his first argument, that the trial court erred by ordering specific performance absent a pending claim for breach of contract, defendant states that finding of fact No. two (2) is "patently incorrect." However, this "finding," in which the trial court construes the allegations of plaintiff's complaint as establishing a claim for specific performance of the agreement and its amendment, is more properly termed a "conclusion of law." Defendant basically argues that, under his interpretation of the language of the pleadings and of the N.C. Rules of Civil Procedure, the trial court would not have reached the conclusion. However, none of defendant's assignments of error challenge the trial court's construction of either the Rules of Civil Procedure or the language of the pleadings. Furthermore, defendant mentions the validity of this finding to support his contention that the trial court lacked authority to order specific performance—an issue not preserved by defendant's assignments of error. Although defendant also discusses finding of fact No. eight (8), he argues only that it is inconsistent with Finding No. two, and not that the finding is not supported by sufficient evidence.

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agreements, or other relevant legal issue. Defendant's series of "generic" assertions that the trial court's findings and conclusions were "erroneous as a matter of law" essentially amount to no more than an allegation that "the court erred because its ruling was erroneous." "Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. 'This assignment—like a hoopskirt—covers everything and touches nothing.' " *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (quoting *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970)). We conclude that the issues defendant briefed on appeal are not preserved for review by defendant's assignments of error, set out as category 'b' above, asserting that a given finding, conclusion, or decretal paragraph was "erroneous as a matter of law."

Moreover, under Rule 28 (b)(6), "[i]mmediately following each question shall be a reference to the assignments of error pertinent to the question["] (emphasis added). In the instant case, the assignments of error referenced by defendant following each question are not pertinent to the legal issues presented.

That assignments of error must identify the legal issues to be briefed is neither a new rule, nor a novel application of the Rules of Appellate Procedure. Indeed, the North Carolina Supreme Court has "repeatedly held that [prior Rules of Practice in the Supreme Court of N.C.] . . . require an assignment of error to state clearly and intelligently what question is intended to be presented[.] . . . These rules are mandatory, and will be enforced." *Kleinfeldt v. Shoney's, Inc.*, 257 N.C. 791, 793, 127 S.E.2d 573, 574 (1962). "The office of an assignment of error, as both the rule and the innumerable cases interpreting it plainly show, is to state directly, albeit briefly, what legal error is complained of and why." *Duke v. Hill*, 68 N.C. App. 261, 264, 314 S.E.2d 586, 588 (1984). Defendant's failure to properly assign error to the questions briefed on appeal violates Rule 10 of the North Carolina Rules of Appellate Procedure, and subjects his appeal to dismissal. See *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360 (2005).

Because defendant failed to properly preserve for appellate review the issues presented on appeal, his appeal is

Dismissed.

Judges WYNN and CALABRIA concur.

ROBERTSON v. ROBERTSON

[174 N.C. App. 784 (2005)]

THERESA BROWN ROBERTSON (NOW BROWN), PLAINTIFF V.
FLOYD VINCENT ROBERTSON, DEFENDANT

No. COA05-229

(Filed 6 December 2005)

**Divorce— equitable distribution—valuation of business—
insufficient supporting findings**

An equitable distribution order was remanded for further findings on the value of defendant's business where the court fixed the disputed separation date and then the fair market value of the business, but did not make findings regarding the evidence used to reach that figure. The court used a figure proffered by plaintiff's expert, but the expert used her own figures, which were not part of the report submitted to plaintiff and the court, and her valuation did not reflect the separation date determined by the court.

Appeal by defendant from judgment entered 15 June 2004 by Judge Charles M. Neaves in Stokes County District Court. Heard in the Court of Appeals 19 October 2005.

Theodore M. Molitoris for plaintiff-appellee.

John J. Korzen for defendant-appellant.

JOHN, Judge.

Floyd Vincent Robertson ("defendant") appeals the trial court's 15 June 2004 equitable distribution judgment ("the Judgment") awarding defendant's former spouse Theresa Brown Robertson ("plaintiff") 37.7 % of the marital estate. For the reasons discussed herein, we vacate and remand the Judgment.

Pertinent procedural and factual background information includes the following: On 29 December 1984, plaintiff and defendant married in Rockingham County, North Carolina. During the marriage, defendant owned and operated Parsons Well Company, a well-drilling and excavation business ("the business"). The parties divorced on 31 March 2003.

Following a hearing, the trial court entered the Judgment which included, *inter alia*, the following findings of fact:

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2. The parties were married to each other December 29, 1984 in Rockingham County, State of North Carolina and separated from one another on or about December 31, 2001. The parties were granted an absolute divorce in the District Court of Forsyth County, North Carolina on March 31, 2003.

. . . .

4. On the date of separation the parties['] marital estate consisted of the following marital property:

. . . .

Net [fair market value] of the well-drilling business including the fixed assets and liabilities is \$230,000.00 less \$13,694.00 (Defendant's separate interest)[.]

Based in part upon the foregoing findings of fact, the trial court concluded as a matter of law that "[a] 50/50 division after weighing distributive factors is not equitable and [defendant] is entitled to 62.3% of the net marital estate and [plaintiff] is entitled to 37.7% of the net marital estate." After allocating a vehicle to plaintiff and deducting from her award payments received previously from defendant, the trial court ordered defendant to pay plaintiff the sum of \$90,000.00. Defendant appeals.

Initially, we note defendant has failed to present argument on one of his original six assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignment of error is deemed abandoned. We therefore limit our present review to those assignments of error properly preserved for appeal.

Defendant's remaining assignments of error challenge the Judgment on grounds it is fatally infected by error in the trial court's valuation of the business. This assertion has merit.

"In an equitable distribution proceeding, the trial court is to determine the net fair market value of the [parties'] property based on the evidence offered by the parties." *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577 (2002) (footnote and citations omitted). While there is no required method to follow in assessing the value of the parties' marital property, "the approach utilized must be 'sound[.]'" In other words, the trial court must determine whether the methodology underlying the testimony offered in support of the value of a marital asset is sufficiently valid and whether that methodology can

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be properly applied to the facts in issue.” *Id.* at 733, 561 S.E.2d at 577-78 (citations omitted). “In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which ‘reasonably approximates’ the net value of the business interest.” *Offerman v. Offerman*, 137 N.C. App. 289, 292, 527 S.E.2d 684, 686 (2000) (quoting *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985)). The trial court’s findings of fact regarding the value of a spouse’s business should be specific, and the trial court should “‘clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied.’” *Offerman*, 137 N.C. at 292, 527 S.E.2d at 686 (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272). Where it appears that the trial court has “‘reasonably approximated the net value of the [business] . . . based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed’” on appeal. *Offerman*, 137 N.C. App. at 292, 527 S.E.2d at 686 (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272).

In *Offerman*, the trial court sought to value a candlestick manufacturing business owned equally by the parties. The plaintiff’s evidence tended to show that, if capitalization of excess earnings was considered in valuating the business, the business had a fair market value of approximately \$378,800.00 on the date of separation. However, the defendant’s evidence tended to show that, where “capitalized earnings,” “capitalized excess earnings,” and “revenue multiple” methods of evaluation were applied, the business had a fair market value of approximately \$37,391.00.

After receiving evidence from both parties, the trial court engaged in what it deemed an “independent assessment of the value of the corporation based upon . . . facts and circumstances . . . a reasonable buyer and seller would have considered on the date of separation,” and it determined the value of the corporation was \$365,000.00. 137 N.C. App. at 294-95, 527 S.E.2d at 687. On appeal, this Court concluded we were unable to determine whether the trial court’s valuation “reasonably approxmate[d]” the value of the parties’ business, noting that

[o]ther than the . . . finding that its valuation was arrived at by considering the “full value of [a partially performed] contract,” there [wa]s neither an indication of the valuation method relied upon by the trial court nor an indication as to what por-

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tion of the assigned value represent[ed] the value of [the business'] goodwill.

Id. at 296, 527 S.E.2d at 688. Consequently, the trial court's equitable distribution judgment was vacated and the case remanded for further findings.

In *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003), the plaintiff husband owned a share in a surgical practice which his expert witness valued at \$89,500.00 on the date of separation. The defendant's expert witness claimed her husband's share of the practice should have a date of separation value of \$170,000.00. The trial court set the date of separation fair market value of the plaintiff's share at \$125,000.00. On appeal, this Court stated the trial court appeared to have "rejected both experts' valuations"; however, because "the trial court failed to identify the evidence on which it based its valuation or the method it used to reach its [own] figure," it was necessary to reverse the court's judgment and remand the case "for further findings of fact on the valuation of [the] plaintiff's interest in his surgical practice." *Id.* at 420, 588 S.E.2d at 522.

In the case *sub judice*, the date of the parties' separation was disputed in their pleadings, defendant contending the date was 31 December 2001 and plaintiff asserting the date of 23 February 2002. Using both an "income approach" and a "cost approach," defendant's expert witness, Brian Napier ("Napier"), set the fair market value of the business on 31 December 2001 at \$77,900.00 and \$91,700.00 on 23 February 2002. However, plaintiff's expert witness, Kathy Diaz ("Diaz"), valued the business at \$375,000.00 on 23 February 2002.

On direct examination, Diaz testified regarding the "four major differences" between her valuation and that of Napier, noting she and Napier examined different amounts of information, utilized different "discount rates" in reaching their conclusions, and made different adjustments regarding the appraisals and tax values of property. When asked whether there were "any significant changes . . . observed in the information provided to [her] between [23 February 2002] and December 31st of 2001 that would have led to an appreciably different value[.]" Diaz replied as follows:

No, not anything that I would have observed. Most of those items that I've talked about, we took into account.

After Diaz testified that she "actually took the extra step of going back and looking at taking their methodology but our numbers and

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what the difference would be[,]” and that “the value [of the business] still rose to well over two hundred thousand dollars[,]” the following exchange occurred:

Q. So you applied their alternate methodology—

A. Methodology to our numbers—

Q. —to the same numbers?

A. —to the numbers that we had come up with for the adjustments that we had made, yes.

Q. And that number was what?

A. It was two hundred and—almost two hundred and thirty thousand dollars.

Q. Okay.

A. And the other—the second main difference—

DEFENDANT’S COUNSEL: Your Honor, I’m going to object to that in that I’ve been provided no documentation with respect to an expert opinion or any calculations. Pursuant to the rules of this Court and specifically stated in the pretrial order, they are required to provide me with fifteen days’ notice of any alternate values that they propose. As such, I move to strike that information.

PLAINTIFF’S COUNSEL: We’re not proposing that as a value.

THE WITNESS: No.

DEFENDANT’S COUNSEL: You Honor, she’s testifying with respect to calculations she made and is testifying to a value therefrom. As such, I’m [en]titled to notice of that and including a written report regarding that.

THE COURT: I will deny your motion, and you may proceed with your witness.

On cross-examination, defense counsel questioned Diaz regarding her written report as follows:

Q. [On page 1, the report reads,] “Our analysis considers those facts and circumstances present at the company at the valuation date. Our opinion would most likely be different if another valuation date was used,” correct?

A. Yes.

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Q. Okay. And so you didn't value the business as of December 31st, did you?

A. No.

Q. So your value only deals with February 23rd, 2002, correct?

A. Uh-huh.

Q. And so [plaintiff's counsel] asked you, you know, is it about the same. You don't know whether it's—you didn't do this calculation for that date—for 12/31, did you?

A. We did some in-house valuations that we did not include in these reports, but since it's not in this report, then [inaudible].

As noted above, the trial court set the parties' date of separation at "on or about" 31 December 2001, and further fixed the fair market value of the business at \$230,000.00 on that date. Although the Judgment recites that the trial court's valuation "includ[ed] the fixed assets and liabilities" of the business, the Judgment contains no findings regarding the evidence used to reach the \$230,000.00 figure.

We acknowledge that \$230,000.00 is precisely the alternate figure proffered by Diaz on direct examination. However, Diaz qualified this number with testimony that all her alternate valuations were done "in-house," and that neither the conclusions nor calculations regarding those alternate values were part of the report submitted to plaintiff or the trial court. Further, although Diaz stated she arrived at the \$230,000.00 figure by employing the same methodology as Napier, she further indicated her own "numbers" were utilized in reaching her conclusion. Finally, and most significantly, the record contains no indication Diaz intended her alternate figure to value the business as of 31 December 2001, the date of separation determined by the trial court. To the contrary, when viewed in its entirety, the testimony of Diaz reveals that each of her calculations was aimed at determining the fair market value of the business on 23 February 2002.

In light of the foregoing, we cannot say "the trial court . . . arrive[d] at a date of separation value which 'reasonably approximate[d]' the net value," *Offerman*, 137 N.C. App. at 292, 527 S.E.2d at 686, of the business. In addition, the Judgment contains no findings which "clearly indicate the evidence upon which [the trial court's] valuation[]" was based or "the valuation method or methods on which [the trial court] relied[.]" *Id.* (quotation marks and citation omitted).

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We therefore vacate the Judgment and remand this case for entry of a new judgment, based upon the existing record, *see Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 725, *disc. review denied*, 335 N.C. 176, 438 S.E.2d 201 (1993), and containing further and appropriate findings of fact regarding the fair market value of the business. We emphasize that our holding does not require voluminous findings from the trial court, but instead simply findings sufficiently adequate to reflect that it has performed the task imposed upon it by our case law. *See, e.g., Offerman*, 137 N.C. App. at 296, 527 S.E.2d at 688; *Fitzgerald*, 161 N.C. App. at 420, 588 S.E.2d at 522.

Vacated and Remanded.

Judges TYSON and JACKSON concur.

STATE OF NORTH CAROLINA v. SUSAN DANETTE WOOD

No. COA05-703

(Filed 6 December 2005)

1. Motor Vehicles— felonious fleeing by motor vehicle to elude arrest—instruction

The trial court did not commit plain error by instructing the jury on the charge of felony fleeing by motor vehicle to elude arrest, because: (1) defendant failed to cite to any case law or statute that requires the trial court to define the terms of “reckless driving,” “negligent driving,” and “driving with license revoked” during its jury instruction; (2) the trial court charged the jury using the language of the pattern jury instruction which stated it had to find at least two of the three aggravating factors set out in the bill of indictment were present in order to convict defendant of felonious speeding to elude arrest; (3) while defendant was not specifically charged with either reckless driving under N.C.G.S. § 20-140 or driving while her license was revoked under N.C.G.S. § 20-28, substantial evidence was presented which tended to show defendant had struck an officer’s vehicle and caused more than \$1,000 in damage; and (4) evidence was presented that tended to show defendant’s driving was erratic, she

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accelerated to hit an officer's vehicle, and the jury found her speeding twelve miles per hour over the limit.

2. Motor Vehicles— driving while impaired—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of impaired driving, because: (1) defendant admitted she had consumed alcohol prior to driving, a fact confirmed by the breathalyzer result and an open half-filled bottle of vodka found in the passenger area of her vehicle; (2) an officer smelled an odor of alcohol when he approached defendant's vehicle a second time and also testified that in his opinion defendant's faculties were appreciably impaired; and (3) nothing in the record indicated that defendant requested the jury to designate on the verdict sheet which prong of the statute it found defendant to have violated.

Appeal by defendant from judgments entered 3 February 2005 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 2 December 2005.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

Richard Croutharmel, for defendant-appellant.

TYSON, Judge.

Susan Danette Wood ("defendant") appeals from judgments entered after a jury found her to be guilty of: (1) felonious fleeing to elude arrest with a motor vehicle; (2) impaired driving; (3) driving with an expired registration; and (4) speeding. We find no error.

I. Background

The State's evidence tended to show that at approximately 6:45 a.m. on 12 July 2003, defendant was driving a 1986 Mercury vehicle on North Main Street in China Grove, North Carolina. China Grove Police Officer Nicholas J. Villa ("Officer Villa") noticed defendant's vehicle displayed an expired license tag and he followed her in his marked patrol vehicle with its blue lights activated. Defendant drove an additional one-half mile before pulling off the road at 1740 Highway 29 North. Defendant testified that was the nearest point where she could safely pull off the road.

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Officer Villa approached defendant's vehicle and asked her to roll down her window so that he could check her driver's license and registration. Defendant rolled down her window about two inches and informed Officer Villa that her driver's license and registration were inside her purse, located in the trunk. Officer Villa instructed defendant to retrieve the items from the trunk. Defendant retrieved a Florida driver's license from her purse but failed to produce the registration card for her vehicle. After checking defendant's license plate number, Officer Villa learned that the vehicle had an "insurance stop" on file.

Officer Villa informed defendant that upon receiving a report of an "insurance stop," an officer must remove the license plate and have the vehicle towed and stored until proper insurance could be verified or obtained. Defendant told Officer Villa that the vehicle was insured and "she had just paid \$20 for the tag and [he] was not going to take her tag." Officer Villa returned to his patrol vehicle, called a tow truck, and began to write a citation charging defendant with failure to maintain liability insurance and failure to show registration. During this time, Rowan County Sheriff's Department Lieutenant Sam Towne ("Lieutenant Towne") joined Officer Villa at the scene.

When Officer Villa saw the tow truck approaching at 6:55 a.m., he picked up a screwdriver and walked toward defendant's vehicle. As Officer Villa bent down to remove the license plate, defendant drove off. Officer Villa and Lieutenant Towne chased defendant in their respective vehicles. During the five mile chase, defendant accelerated to fifty-seven miles per hour in a forty-five miles per hour speed zone. Eventually, defendant hit her brakes, turned off into a driveway area, and started to turn around as if to return onto the highway. Lieutenant Towne positioned his vehicle to block defendant's entrance back onto the highway. Defendant accelerated and "slammed into [Lieutenant Towne's] car" causing an estimated \$1,830.55 in damage. Officer Villa "boxed in" defendant by positioning his vehicle behind her vehicle.

Other law enforcement officers arrived and removed defendant from her vehicle. As defendant was removed from her vehicle, Officer Villa testified he noticed a strong odor of alcohol emitting from defendant. A half-empty bottle of vodka was found in defendant's vehicle. Officer Villa asked defendant if she would submit to a field breathalyzer test. Defendant refused to answer. Based on defendant's demeanor and Officer Villa's past experience, he formed the opinion that defendant's mental and physical faculties were impaired by alcohol.

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After being transported to the Salisbury Police Department, defendant was read her rights, observed for the mandatory waiting period, and at 8:50 a.m. took the Intoxilyzer test. The test registered a 0.07 breath alcohol concentration.

At trial on 2 February 2005, Paul Glover (“Glover”), an employee of the Department of Health and Human Services for the Forensic Tests Alcohol Branch, testified that he had performed a retrograde extrapolation which he believed would show defendant’s alcohol concentration at the time of the original stop of defendant’s vehicle to have been 0.10. The State laid no foundation to show the relevancy of this testimony and Glover failed to correlate any factors to be consistent with this defendant or to compare his averages to defendant’s individual specific characteristics.

On 3 February 2005, the jury returned guilty verdicts for felony speeding to elude arrest, impaired driving, expired registration, and speeding fifty-seven miles per hour in a forty-five miles per hour zone. The trial court entered judgments and imposed an active sentence of six months for the driving while impaired conviction and a suspended term of eight to ten months for the speeding to elude arrest, speeding, and expired registration convictions. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) failing to properly instruct the jury on the felony fleeing to elude arrest by motor vehicle; and (2) denying defendant’s motion to dismiss the driving while impaired charge.

III. Felony Fleeing to Elude Arrest by Motor Vehicle

[1] Defendant first contends the trial court failed to properly instruct the jury on the charge of felony fleeing to elude arrest by motor vehicle. Defendant did not object to the trial court’s instructions and asks this Court to review for plain error.

Plain error arises when the error is “ ‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]’ ” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Here, the trial court instructed the jury on felony fleeing to elude arrest by motor vehicle as follows:

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The defendant has been charged with felonious operation of a motor vehicle to elude arrest. For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt.

First, that the defendant was operating a motor vehicle. Second, that the defendant was operating that motor vehicle on a street, highway or public vehicular area. Third, that the defendant was fleeing or attempting to elude a law enforcement officer who was in the lawful performance of his duties, a law enforcement officer with authority to enforce motor vehicle laws . . . And fourth, that two or more of the following factors were present at the time—reckless driving, [] negligent driving leading to an accident causing property damage in excess of \$1,000, or driving while her license were revoked.

Defendant specifically argues that since “reckless driving,” “negligent driving,” and “driving with license revoked” were the three named aggravating factors that led to her conviction under N.C. Gen. Stat. § 20-141.5(b)(5), the trial court should have defined those terms for the jury. Defendant fails to cite to any case law or statute which requires the trial court to define those terms during its jury instruction. Furthermore, the trial court properly charged the jury using the language of the pattern jury instruction which stated it had to find at least two of the three aggravating factors set out in the bill of indictment were present in order to convict defendant of felonious speeding to elude arrest. N.C.P.I. Crim. 270.54A; *see State v. Woodard*, 146 N.C. App. 75, 552 S.E.2d 650 (2001). While defendant was not specifically charged with either reckless driving under N.C. Gen. Stat. § 20-140 or driving while her license was revoked under N.C. Gen. Stat. § 20-28, substantial evidence was presented which tended to show defendant had struck Lieutenant Towne’s vehicle and caused more than \$1,000.00 in damage. Evidence was presented that tended to show defendant’s driving was erratic, she accelerated to hit Lieutenant Towne’s vehicle, and the jury found her speeding twelve miles over the limit. Defendant has failed to meet her burden under plain error review to warrant a new trial. This assignment of error is overruled.

IV. Motion to Dismiss

[2] Defendant also contends the trial court erred in denying her motion to dismiss her driving while impaired conviction based on

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insufficiency of the evidence. Defendant argues that the State did not present substantial evidence that she was impaired. We disagree.

A. Standard of Review

The standard for ruling on a motion to dismiss “is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.” *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). “Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.” *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C. Gen. Stat. § 20-138.1 (2003). Under section (2) of the statute, the only relevant evidence of this defendant’s alcohol concentration was a breathalyser result of 0.07. Other testimony sufficiently supports the jury’s conviction of defendant under N.C. Gen. Stat. § 20-138.1(a)(1) of driving “[w]hile under the influence of an impairing substance.” See *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984) (N.C. Gen. Stat. § 20-138.1 creates one offense that “may be proved by either or both theories.”); see also *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff’d*, 357 N.C. 242, 580 S.E.2d 693 (2003) (“The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment . . .”). “An officer’s opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer’s personal observation of an odor of alcohol and of faulty driving or other evidence of impairment.” *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (citation omitted).

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Here, defendant admitted she had consumed alcohol prior to driving, a fact confirmed by the breathalyzer result, and an open half-filled bottle of vodka was found in the passenger area of her vehicle. Officer Villa smelled an odor of alcohol when he approached defendant's vehicle a second time. Officer Villa also testified that in his opinion defendant's faculties were appreciably impaired.

The jury's verdict does not reflect which prong of the statute they found defendant had violated. Nothing in the record indicates defendant requested the jury designate on the verdict sheet which prong it found defendant to have violated. As defendant failed to: (1) request separate instructions; (2) object to the trial court's instructions; (3) assign error to the instructions; or (4) request that the jury determine on the verdict sheet under which prong of the statute they found her guilty or argue plain error, this issue is not reviewable. The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

V. Conclusion

The trial court properly instructed the jury on the charge of felony fleeing to elude arrest by motor vehicle. The trial court did not err in denying defendant's motion to dismiss the charge of impaired driving. Sufficient evidence was presented which tended to show defendant was driving while impaired. We find no error.

No error.

Judges McCULLOUGH and ELMORE concurs.

GLOBAL CIRCUITS OF N.C., INC. v. CHANDAK

[174 N.C. App. 797 (2005)]

GLOBAL CIRCUITS OF NORTH CAROLINA, INC., PLAINTIFF v. GOVIND CHANDAK
AND MADHU CHANDAK, DEFENDANTS v. BHARAT BARAI, PANNA BARAI,
W. THURSTON DEBNAM, JR., AND SMITH DEBNAM NARRON WYCHE STORY
& MYERS, L.L.P., THIRD-PARTY DEFENDANTS

ELECTRONIC INTERCONNECT CORPORATION, GLOBAL CIRCUITS OF NORTH
CAROLINA, INC. F/K/A GLOBAL CIRCUITS ACQUISITION COMPANY, BHARAT
BARAI, M.D., AND PANNA BARAI, M.D., PLAINTIFFS v. GOVIND CHANDAK AND
MADHU CHANDAK, DEFENDANTS

No. COA04-1648

(Filed 6 December 2005)

1. Appeal and Error— record—evidence at hearing not presented—assignments of error dismissed

Plaintiffs' assignments of error arising from an arbitration were dismissed where the record did not reflect the evidence presented to the arbitration panel, in violation of Rule 9(a)(1)e of the Rules of Appellate Procedure. The memorandum of an advocate cannot be a proper substitute for establishing the evidence received during an arbitration proceeding.

2. Arbitration and Mediation— reasoning of award—not required

There was no remand of an arbitration award which did not include the reasoning for the arbitration panel's decision; the arbitration agreement did not require the arbitrators to set forth their reasoning, nothing in the record suggests that defendants assented to plaintiffs' request for a statement of reasoning, and there is no persuasive authority that suggests that the panel was required to provide its reasoning on these facts.

3. Arbitration and Mediation— award—not ambiguous

An arbitration award was not ambiguous and inconsistent where it fully addressed the issues presented by the parties and set forth its decision in clear terms.

Appeal by Global Circuits of North Carolina, Inc., Electronic Interconnect Corporation, Global Circuits of North Carolina, Inc., f/k/a Global Circuits Acquisition Company, Bharat Barai, M.D., and Panna Barai, M.D. (plaintiffs) from judgment entered 2 September 2004 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 23 August 2005.

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Ellis & Winters, LLP, by Paul K. Sun, Jr. for plaintiffs-appellants.

Ward and Smith, P.A., by Gary J. Rickner, for defendants-appellees.

LEVINSON, Judge.

Several of the parties in the instant case were involved in a related litigation, *Chandak v. Electronic Interconnect Corp.*, 144 N.C. App. 258, 550 S.E.2d 25 (2001). This appeal arises from an order confirming an arbitration award entered pursuant to the parties' agreement to arbitrate all claims arising from the sale of Global Circuits of North Carolina, Inc. We have included only those facts necessary to an understanding of the issues presented in the current appeal.

The 20 November 2003 arbitration award provided, in pertinent part, the following:

The Panel therefore answers the substance of the issues submitted by Claimants as follows:

1. Were claimants damaged by fraud of respondents in connection with the sale of the business?

ANSWER: No.

2. Were claimants damaged by deceptive trade practices of respondents in the sale of the business?

ANSWER: No.

3. Were claimants damaged by breach of fiduciary duty of respondents in purchasing the Global property?

ANSWER: No.

4. Were claimants damaged by deceptive trade practices of respondents in respondents' purchase of the Global property?

ANSWER: No.

5. Did respondents abuse the process of the court in the summary ejectment action instituted against claimant Electronic Interconnect Corporation and Global Circuits of North Carolina, Inc.?

ANSWER: No.

GLOBAL CIRCUITS OF N.C., INC. v. CHANDAK

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6. Did respondents breach the lease agreement with Global Circuits of North Carolina, Inc.?

ANSWER: Yes.

7. What amount of damages is claimant Global Circuits of North Carolina, Inc. entitled to recover from respondents for breach of the lease?

ANSWER: \$15,000.

Therefore, claimants Electronic Interconnect Corporation, Bharat Barai, M.D. and Panna Barai, M.D. are not entitled to any award of damages against the respondents, and all claims made by these claimants against the respondents in this arbitration are hereby denied. Claimant Global Circuits of North Carolina, Inc. is entitled to an award of damages against respondents, Govind Chandak and Madhu Chandak in the amount of \$15,000.00, and this claim by Global Circuits of North Carolina, Inc. against respondents in this arbitration is hereby allowed.

Respondents are found by the Panel to be the prevailing parties in this arbitration on all claims except the breach of lease claim by Global Circuits of North Carolina, Inc. Claimant Global Circuits of North Carolina, Inc. is found by the Panel to be the prevailing party in connection with the breach of lease claim. . . .

Plaintiffs filed motions to vacate the award; Govind Chandak and Madhu Chandak (defendants) filed motions to confirm the award. On 2 September 2004 the trial court entered an order denying plaintiffs' motions to vacate the arbitration award and granting defendants' motions to confirm the award. From this order plaintiffs now appeal. We affirm.

[1] On appeal, plaintiffs first contend the trial court erred by failing to vacate the arbitration award because the arbitration panel "manifestly disregarded the law." According to plaintiffs, the panel (1) failed to apply principles of collateral estoppel to plaintiffs' abuse of process claim; (2) ignored the facts and the law regarding plaintiffs' claim of wrongful acquisition of the Global property; and (3) ignored the law regarding plaintiffs' claim of fraud concerning the sale of the business. We conclude that, by violating the requirements of N.C.R. App. P. 9, plaintiffs have not provided us with the necessary materials to evaluate these issues.

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Under N.C.R. App. P. 9(a)(1)e, the record in a civil action shall contain “so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned[.]” “It is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects appeal to dismissal.” *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 754, 315 S.E.2d 537, 538-39 (1984) (citations omitted).

The introductory paragraphs of the arbitration award stated, *inter alia*, that the panel members “received into evidence all exhibits tendered by the parties’ counsel . . . [and] the sworn oral testimony of . . . witnesses[.]” Based “solely upon the evidence of record in this case,” the panel entered the award set forth above. As a necessary predicate to an evaluation of plaintiffs’ arguments, the record on appeal must reflect what evidence was presented to the arbitration panel. While the arbitration agreement specifically afforded the parties the ability to record the arbitration hearing, this Court has not been provided a transcript of the arbitration hearing. Nor have we been provided a narrative of the proceedings; a listing of the witnesses proffered by the parties and a summary of their testimonies; and/or an identification of the exhibits actually presented to the arbitration panel. Plaintiffs’ appeal rests largely on their contention that the arbitration panel did not properly consider the legal effects of a N.C.R. Civ. P. 11 sanctions order; however, we cannot even discern from the record whether the sanctions order was, indeed, submitted to the panel.

The only documents in the record we can definitively conclude were submitted to the arbitration panel are the parties’ post-arbitration hearing briefs labeled “Claimants’ Post-Hearing Brief” and “Respondents’ Post-Arbitration Submission.” These briefs summarize the parties’ contentions about what the evidence demonstrated. We know these briefs were submitted to the panel only because the language of the arbitration award itself states these were considered. In their Post-Hearing brief, plaintiffs make many of the arguments they now make on appeal. The legal memorandum of an advocate cannot, of course, be a proper substitute for establishing what evidence was received during the arbitration hearing. And the legal memorandum itself references exhibit numbers that do not correspond with exhibit numbers included in the record on appeal. That plaintiffs, in attempting to support many of the factual

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contentions in their brief, reference only this memorandum, or other legal memoranda, is additional support for our conclusion that we cannot know what took place during the arbitration hearing. We note only two examples.

First, plaintiffs contend there was “undisputed evidence” presented to the arbitration panel of defendants’ wrongful acquisition of the Global property. As support for this contention, plaintiffs point this Court to their 3 November 2003 Post-hearing Brief, which is, again, a legal memorandum. In this memorandum, there are additional cites to Exhibits C28, C31, A45, A34, A40, and A20. While the legal memorandum recounts and summarizes witness testimony, this Court has no way to determine whether this testimony was, indeed, offered before the arbitration panel. There are no exhibits in the record which can be identified as exhibits A45, A34, A40, and A20. And while there is one exhibit attached in the Appendix to appellants’ brief which might correspond with C28 or C31, there is no indication this exhibit was submitted to the arbitration panel. As a further example, plaintiffs contend that “[u]ndisputed evidence at the hearing showed that [Electronic Interconnect] and the Barais paid \$1,000,000 for the Global business[.]” As support for this contention, plaintiffs again point to legal briefs, which recite factual allegations that may or may not have been independently presented to the arbitration panel.

Without a record of the evidence and the law presented to the arbitration panel, we cannot begin to evaluate whether the arbitration panel “manifestly disregarded the law” and whether the superior court judge, in turn, erred by failing to conclude the same.

Though not essential to our holding, we observe that the record does not include a transcript or other definitive indicia of what exhibits were presented to the trial court by plaintiffs on their motions to vacate the arbitration award. In its order denying plaintiffs’ motions to vacate, the trial court noted it considered the “arguments of counsel[,] . . . the Court file, the memoranda of law submitted by the parties, and the pleadings and other submissions from the arbitration[.]” (emphasis added). Because the record does not establish what “submissions from arbitration” were offered by plaintiffs in their motions to vacate, it is exceedingly difficult for this Court to evaluate whether the trial court itself erred in denying plaintiffs’ motions to vacate. The relevant assignments of error are dismissed.

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[2] Plaintiffs next contend that the arbitration award must be modified by the arbitration panel to include “a statement of the reasoning for the panel’s decision.” We disagree.

The arbitration agreement itself does not require the arbitrators to set forth the reasons for their award. The arbitration agreement provided only that:

The award shall be set forth in writing; it shall be signed by the Arbitrators who concur in making the award; and shall state the amount, if any, of the award separately with respect to each of the claims asserted by Barai and Chandak.

Nonetheless, plaintiffs contend that the panel was “required” to include such a statement because the same was included in plaintiffs’ written “summary of the subjects discussed” during a preliminary hearing preceding the arbitration. According to plaintiffs, the written summary included “clarifications of the [arbitration a]greement.” The preliminary hearing was held consistent with the terms of the arbitration agreement, which provided that the parties would “discuss the future conduct of the case” and “address any other matters [the parties] or the Arbitrators may wish to consider.” After the panel made its award, and plaintiffs again “requested” a statement of its reasoning, the panel declined to do so because (1) it was not required by the terms of the arbitration agreement, and (2) the same “is not customary in arbitrations in North Carolina.”

Nothing in the record suggests defendants assented to plaintiffs’ request or independently urged the arbitration panel to provide a statement of its reasoning. Nor do plaintiffs cite this Court to any persuasive authority that suggests the panel was required to provide a statement of its reasoning on these facts. We conclude this argument is without merit.

[3] Plaintiffs next contend that the form of the arbitration award is inconsistent and ambiguous, and that the award does not definitively express who the “prevailing” party is. Contrary to plaintiffs’ contentions, the arbitration award fully addresses the issues presented to it by the parties and sets forth its decision in clear terms. The award is neither ambiguous nor inconsistent.

Affirmed.

Judges HUDSON and CALABRIA concur.

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[174 N.C. App. 803 (2005)]

INGRID SWANSON, PLAINTIFF v. RICHARD THOMAS HERSCHEL, DEFENDANT

No. COA04-1307

(Filed 6 December 2005)

1. Appeal and Error— appealability—mootness—child reached age of majority

Although defendant contends the trial court erred in a child support case by ruling that plaintiff's action of refusing to return their oldest child to defendant on 17 August 2003 as scheduled did not constitute willful contempt, this assignment of error is dismissed as moot because the child has since turned eighteen and is thus no longer a minor.

2. Child Support, Custody, and Visitation— arrearage—sufficiency of notice

The trial court did not err by concluding that the matter of child support arrearage was properly before the trial court even though defendant contends he did not receive sufficient notice, because: (1) plaintiff's motion regarding custody and child support on 19 August 2003 apprised defendant that the hearing would include child support issues including arrearage; and (2) even though defendant contends that it was unclear which motion was being brought for hearing when plaintiff's notice of hearing only referred to the motion as the August 2003 motion instead of referring to a specific date, plaintiff only made one motion in August.

3. Child Support, Custody, and Visitation— arrearage—calculation

The trial court's calculation of child support arrearages is vacated and remanded for more specific findings regarding the amount due for the periods in question.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from order entered 16 March 2004 by Judge Alonzo B. Coleman, Jr., in Orange County District Court. Heard in the Court of Appeals 20 April 2005.

Coleman, Gledhill, Hargrave & Peek, P.C., by Leigh Peek, for plaintiff-appellee.

Levine & Stewart, by John Stewart, for defendant-appellant.

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HUDSON, Judge.

On 19 August 2003, plaintiff filed a motion seeking modification of custody, enforcement of prior child support payments due, and modification of the monthly child support amount. On 21 August 2003, defendant filed a motion for order of contempt, alleging that plaintiff violated a November 2001 custody order. Both motions were heard on 2 March 2004 in district court. The court entered an order on 16 March 2004 in which it ruled, in pertinent part, that plaintiff was not in willful contempt of prior court orders and that defendant pay child support arrearage of \$9000. Defendant appeals.

The evidence tends to show the following. Plaintiff and defendant have three children of their marriage, all of whom were minors at the time of the parties' divorce in 1996. The parties agreed to share joint legal custody of the minor children with plaintiff having primary physical custody and defendant having liberal visitation. At the time of the separation, both parties resided in Greensboro, but plaintiff moved to Chapel Hill in June 1998. In the fall of 1999, defendant moved to Pennsylvania to take a new job. In November 2001, the court granted temporary physical custody of the oldest child, Timothy, to defendant. The record reveals that plaintiff filed several motions for modification of child support and for contempt between 1999 and 2003, alleging that defendant had failed to pay adequate child support and other agreed expenses (such as childcare and travel costs), and had failed to cooperate with the parenting coordinator.

While visiting plaintiff in the summer of 2003, Timothy, who was seventeen at the time, expressed his desire to remain in her custody rather than return to defendant in Pennsylvania as planned. Plaintiff thus enrolled Timothy in school in North Carolina. Her testimony at trial showed that defendant was on vacation during the school enrollment period and she had no way to contact him to discuss this situation. Defendant asserted that he was available and that plaintiff did not call him. Although plaintiff was aware that defendant was designated the temporary custodian, she believed that Timothy's stated wishes would govern his placement, as they had when he originally went to live with defendant in 2001. On 19 August 2003, shortly after enrolling Timothy in school, plaintiff filed a formal motion to change custody. On 21 August 2003, defendant filed a motion to have plaintiff held in contempt, alleging that she willfully violated the prior custody order by refusing to return Timothy to defendant on 17 August 2003, as scheduled.

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[1] First, defendant argues that the trial court erred in ruling that the plaintiff's actions did not constitute willful contempt. This assignment of error is moot since Timothy Herschel has turned eighteen, and is thus no longer a minor. N.C. Gen. Stat. § 48A-2 (2003). Defendant alleges that plaintiff contemptuously refused to comply with a custody order pertaining to the then minor child Timothy. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (internal citation omitted). "[A]n appeal presenting a question which has become moot will be dismissed." *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). As any orders regarding the custody of Timothy when he was a minor no longer apply now that he has reached the age of majority, this issue is moot and is thus dismissed.

[2] Defendant next argues that the matter of child support arrearage was not properly before the trial court because he did not receive sufficient notice. We disagree. Whether a party has adequate notice is a question of law, which we review *de novo*. See *Trivette v. Trivette*, 162 N.C. App. 55, 58, 590 S.E.2d 298, 302 (2004). "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). Notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *City of Randleman v. Hinshaw*, 267 N.C. 136, 140, 147 S.E.2d 902, 905 (1966).

Here, plaintiff filed a "motion regarding custody and child support" on 19 August 2003. In this motion, plaintiff states, in pertinent part:

2. That the plaintiff has filed several child support motions which have not yet been heard, dealing with the support and maintenance of the three minor children who are subjects of this action. That the motions were filed in a timely manner, and support should be set in accord with these motions based upon the demonstrable income of the parties during the relevant time periods.

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3. That current child support should be modified and changed to include all three minor children, effective as of the date of filing of this motion, or the date the minor child Timothy took up his residence with Plaintiff, whichever the court deems appropriate.

4. That as to child support, the Plaintiff requests that this Court instruct the Defendant to cease and desist from deducting any amount or credit he deems appropriate from the monthly child support obligation for any reason whatsoever.

She then asks the court to enter an order modifying and increasing child support and to instruct the defendant to pay the ordered support each month without deductions. This notice clearly apprised defendant that the hearing would include child support issues, including arrearage. Defendant argues that plaintiff's notice of hearing, which stated that she was bringing "the August 2003 Motion" on for hearing on 2 March 2004, was ambiguous. He asserts that because there was also a defense motion made in August, and plaintiff's notice of hearing does not refer to her motion by specific date, but only as "the August 2003 Motion," that it was unclear which motion was being brought for hearing. However, plaintiff only made one motion in August and after she filed the notice of hearing on 23 January 2004, defendant subsequently filed a notice of hearing on 3 February 2004, stating that he would be bringing his motion for contempt on for hearing on 2 March 2004. This assignment of error has no merit.

[3] Finally, defendant contends that the trial court improperly calculated the child support arrearage. In reviewing child support orders, this Court is bound by the trial court's findings where there is competent evidence to support them. *See, e.g., Mackins v. Mackins*, 114 N.C. App. 538, 547, 442 S.E.2d 352, 357-58, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). Here, there was limited testimony regarding the arrearage at trial, no financial affidavits submitted by either party, and no worksheets in the record. The plaintiff submitted a spreadsheet her attorney prepared which calculated the amounts paid and amounts due. This spreadsheet was the only document submitted to this Court and portions of it are illegible, and the worksheets to which it refers are not included in the record on appeal. The trial court's pertinent findings of fact are as follows:

Upon consideration of the written documentation submitted and after hearing testimony, the court determines the Defendant child support arrears as follows:

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From January of 1999 through December of 1999, Defendant owes \$2,197.00 to the Plaintiff.

From January of 2000 through December of 2000, Defendant owes \$2,494.16 to the Plaintiff.

From January of 2001 through December of 2001, Defendant owes Plaintiff \$3,759.85.

From January of 2003 through December of 2003, Defendant owes Plaintiff \$1968.00

From January of 2004 through March 2004, the Defendant owes the Plaintiff \$1497.00.

We conclude that these findings and the evidence are insufficient:

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated.

Gibson v. Gibson, 68 N.C. App. 566, 569, 316 S.E.2d 99, 102 (1984) (internal quotation marks and citations omitted). With such scant evidence before us, we are unable to determine whether the trial court properly calculated the arrearages. Accordingly, we must vacate and remand that portion of the judgment for more specific findings regarding the amount due for the periods in question.

Dismissed as moot in part;

Vacated and remanded in part.

Judge GEER concurs.

Judge HUNTER concurs in part and dissents in part.

HUNTER, Judge, concurring in part and dissenting in part.

I disagree with the majority's decision to remand this case to the trial court for further findings regarding defendant's child support arrearage. I otherwise concur in the majority opinion.

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As noted by the majority, plaintiff submitted a spreadsheet calculating the child support paid by defendant and the amounts due. Plaintiff testified that the document was a true and accurate representation of the amounts due. Defendant did not object to the document submitted by plaintiff or to her testimony. I would hold that this evidence was competent and constituted a sufficient basis upon which the trial court could rely in making its findings regarding defendant's child support arrearage.

Further, although defendant argues the trial court relied upon "faulty" and insufficient evidence to make its findings, he failed to include legible copies of the spreadsheet, or the worksheets to which it refers, in the record on appeal. "If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a)(1). Similarly, Rule 9 of the North Carolina Rules of Appellate Procedure requires the appellant to include in the record on appeal "so much of the evidence . . . as is necessary for an understanding of all errors assigned[.]" N.C.R. App. P. 9(a)(1)(e). "It is the duty of the appellant to ensure that the record is complete." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *Id.* at 390, 576 S.E.2d at 414 (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)). Thus, defendant has failed to provide a sufficient record from which it can be determined whether the trial court's findings of fact are supported by competent evidence. I would therefore overrule this assignment of error and affirm the decision of the trial court.

JENNY WOODS AND BRIAN WOODS, PLAINTIFFS v. BILLY'S AUTOMOTIVE, DEFENDANT

No. COA05-69

(Filed 6 December 2005)

Corporations— pro se appearance by corporation in small claims court—general appearance—right to challenge improper service waived

The owner and operator of an incorporated automotive repair business could represent the business pro se in small claims court, but his participation constituted a general appearance

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which waived his right to challenge his acceptance of service (he was not an officer, director, or managing agent of the corporation). The district court erred by overturning the magistrate's judgment for improper service.

Appeal by Plaintiffs from order entered 6 August 2004, by Judge Albert A. Corbett, Jr., District Court, Harnett County. Heard in the Court of Appeals 20 September 2005.

Morgan, Reeves & Gilchrist, by Robert B. Morgan for plaintiff-appellants.

Bain, Buzzard & McRae, by Edgar R. Bain. No brief filed by defendant-appellee.

WYNN, Judge.

Under North Carolina law, except in a Small Claims Division action, "a corporation cannot appear and represent itself in proper person or by its officers, but can do so only by an attorney admitted to practice law." *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 207-08, 573 S.E.2d 547, 549 (2002) (citation omitted). Here, Plaintiffs appeal an order vacating a magistrate court's judgment because the corporation was not properly served as a corporation. We hold that where a corporation being sued in the Small Claims Division is represented at trial, the corporation has made a general appearance before the court and has waived any right to challenge proper service. We therefore reverse the order of the district court.

Since Defendant Billy's Automotive chose not to file a brief, we must rely on the facts supplied to us by Plaintiffs. This action arose from a dispute regarding the repair of Plaintiffs' automobile that was damaged in a car accident. On 15 June 2004, Plaintiffs filed a complaint in the Harnett County District Court—Small Claims Division against Defendant seeking relief for possession of personal property and monetary damages for loss of use of their automobile. The complaint alleged that Billy's Automotive is a corporation.

On 26 June 2004, summons was served on Defendant by delivering a copy personally to William Gerald Ray, also known as "Billy Ray," at the address of the business. Mr. Ray is the owner and operator of Billy's Automotive. On 30 June 2004, a hearing was held before Magistrate John Todd. Mr. Ray testified and fully participated in the

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trial on behalf of Defendant Billy's Automotive. Although Defendant did not file a counterclaim in this action, Defendant claimed orally that Plaintiffs owed approximately Four Thousand Two Hundred Dollars (\$4,200.00) for the repairs performed on Plaintiffs' automobile. Neither party was represented by counsel at the trial before the magistrate court.

Magistrate Todd entered judgment on 30 June 2004, ordering Defendant (1) to deliver the automobile to Plaintiffs; and (2) to pay the sum of Three Hundred Twenty-Five Dollars (\$325.00) to Plaintiffs for loss of use of their vehicle and Fifty-Five dollars (\$55.00) in court costs. Defendant did not appeal the magistrate court's judgment.

On 8 July 2004, Defendant paid to the clerk of court the sum of Three Hundred Eight-Five Dollars and Fifty-Seven cents (\$385.57), as payment in full of the judgment and court costs. Although Defendant complied with the monetary judgment, Defendant did not deliver the automobile to Plaintiffs. Thus, on 13 July 2004, Plaintiffs requested that the clerk of court issue a Writ of Possession for Personal Property and that it be served on Defendant.

On 20 July 2004, Plaintiffs filed a Motion for Reissue of the Writ of Possession. On that same day, Magistrate Todd filed a Motion to Set Aside Magistrate Civil Judgment in the district court, claiming lack of jurisdiction and incomplete judgment. Magistrate Todd contended that the small claims court did not have jurisdiction to hear the case because the value of the property to be recovered was greater than Four Thousand Dollars (\$4,000.00). Magistrate Todd also contended that the written judgment rendered was incomplete in that the portion where Plaintiffs were to pay Defendant for the cost of repairs was not included in the written judgment.

On 21 July 2004, Mr. Ray, through counsel, filed a separate motion under Rule 60 of the North Carolina Rules of Civil Procedure to set aside the magistrate court's judgment for improper service. Mr. Ray alleged in his motion that the judgment should be set aside because "[n]o legal entity is named as Defendant in the lawsuit[.]" and "[t]he pleadings and judgment entered in this case do not identify the Defendant as being an individual trading as Billy's Automotive, or as a partnership, or as a corporation, or as a limited liability company."

On 26 July 2004, a hearing was held in the district court on both Rule 60 motions. District Court Judge Albert Corbett, Jr., entered an order on 6 August 2004, setting aside the magistrate court's judgment for lack of proper service on Defendant. The district court found that

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the complaint was served on Defendant as a corporation, but that service upon Defendant did not comply with Rule 4 of the North Carolina Rules of Civil Procedure in that it “was not delivered to an officer, director or managing agent of the corporation or no copies left in the office of such officer, director or managing agent of the office.” The district court reserved ruling on Magistrate Todd’s motion to set the judgment aside on the basis of lack of subject matter jurisdiction and incomplete judgment pending further proceedings.

On appeal, Plaintiffs contend that the district court committed reversible error in (1) finding that proper service had not been had against Defendant; and (2) holding Magistrate Todd’s Rule 60 motion in abeyance pending further proceedings.

North Carolina Rule of Civil Procedure 60(b)(4) allows a trial court to grant relief from a judgment that is void. N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2004). The granting of a Rule 60(b) motion is within the trial court’s sound discretion and is reviewable only for abuse of discretion. *Gentry v. Hill*, 57 N.C. App. 151, 154, 290 S.E.2d 777, 779 (1982). Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason. *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted). “If there is ‘competent evidence of record on both sides’ of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence, and the trial court’s findings supported by competent evidence are conclusive on appeal.” *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134-35 (2002) (citation omitted), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003).

Here, the district court concluded that “[t]he summons does not show that Billy Ray, Jr. was an officer, director or managing agent of the corporation, or that the summons was left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.” Therefore, “the summon[s] as served is not legal service and the judgment herein entered by Magistrate Todd should be set aside.”

Rule 4(j)(6)(a) of the North Carolina Rules of Civil Procedure provides that service upon a domestic corporation may be accomplished:

- a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or

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managing agent with the person who is apparently in charge of the office.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(a) (2004). For a court to render a valid judgment against a defendant, it is essential that jurisdiction of the party has been obtained by the court in some way allowed by law. *See Guerin v. Guerin*, 208 N.C. 457, 458, 181 S.E. 274, 274 (1935) (“Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him.”); *see also Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967). “When a court of general jurisdiction undertakes to grant a judgment in an action where it has not acquired jurisdiction of the parties by voluntary appearance or the service of process the judgment is absolutely void and has no effect.” *Monroe v. Niven*, 221 N.C. 362, 364, 20 S.E.2d 311, 312 (1942).

In the case *sub judice*, the complaint states that the defendant is named “Billy’s Automotive,” and that Defendant is a corporation. Thus, service on Billy’s Automotive must comply with North Carolina Rule of Civil Procedure 4(j)(6). Summons was issued to Billy’s Automotive and served by delivering a copy to Mr. Ray on 26 June 2004. However, Mr. Ray is not an officer, director or managing agent of Billy’s Automotive. Thus, under the requirements for service of a domestic corporation under North Carolina Rule of Civil Procedure 4(j)(6), Mr. Ray cannot accept service on behalf of Billy’s Automotive. We therefore find that Defendant was not properly served.

Plaintiffs contend, however, that Defendant waived any challenges to service of process because Mr. Ray actively represented Defendant at trial and Defendant subsequently paid the ordered judgment. Although “[t]he prevailing rule is that a corporation cannot appear and represent itself either in proper person or by its officers, but can do so only by an attorney admitted to practice law[.]” *Lexis-Nexis, Div. of Reed Elsevier*, 155 N.C. App. at 207, 573 S.E.2d at 549 (citation omitted), this Court has recognized an exception for a corporation representing itself *pro se* in the Small Claims Division. *Id.* at 208, 573 S.E.2d at 549. “[I]n enacting our small claims court system . . . the General Assembly apparently intended to provide our citizens, corporate, as well as individual, with an expedient, inexpensive, speedy forum in which they can process litigation involving small sums without obtaining a lawyer.” *Id.* (quoting *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987)). Therefore, Mr. Ray could represent Billy’s Automotive in the Small Claims Division without obtaining an attorney. The threshold ques-

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tion is whether Defendant made a general appearance before the court and waived any challenges to service of process by actively participating in trial and paying the ordered judgment. We find that it did.

North Carolina General Statute section 1-75.7(1) provides:

A court of this State having jurisdiction of the subject matter may, without serving summons upon him, exercise jurisdiction in an action over a person:

- (1) Who makes a general appearance in an action; provided that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance[.]

N.C. Gen. Stat. § 1-75.7(1) (2004). Section 1-75.2(3) defines the term “defendant” as “the person named as a defendant in a civil action.” N.C. Gen. Stat. § 1-75.2(3) (2004). The term “person” is defined as “any natural person, partnership, corporation, body politic, and any unincorporated association, organization or society which may sue or be sued under a common name.” N.C. Gen. Stat. § 1-75.2(1).

Courts have interpreted the concept of “general appearance” liberally. Our Supreme Court discussed the application of section 1-75.7 and the concept of “general appearance” in North Carolina law in *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974). In *Simms*, the Court made clear that if a party “invoked the judgment of the court for any other purpose [than contesting service of process] he made a general appearance and by so doing he submitted himself to the jurisdiction of the court whether he intended to do so or not.” *Id.* at 151, 203 S.E.2d at 773; *see also Vestal v. Moseley Vending Mach. Exch., Inc.*, 219 N.C. 468, 14 S.E.2d 427 (1941) (a corporate defendant's appearance and filing of a demurrer constituted a general appearance); *Alexiou v. O. R. I. P., Ltd.*, 36 N.C. App. 246, 248, 243 S.E.2d 412, 414 (1978) (defendant made a general appearance where he gave notice of appeal of magistrate court's judgment). In short, “[a]n appearance for any purpose other than to question the jurisdiction of the court is general[.]” *Dailey Motor Co. v. Reaves*, 184 N.C. 260, 264, 114 S.E. 175, 177 (1922) (citation omitted).

Here, the evidence shows that Mr. Ray received the summons by service of a county sheriff, addressed to Billy's Automotive, with the company's name, “Billy's Automotive,” appearing on the complaint contained therein. Pursuant to the summons, Mr. Ray, the owner and operator of “Billy's Automotive,” attended the magistrate court pro-

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[174 N.C. App. 814 (2005)]

ceedings and fully participated on Defendant's behalf. In doing so, Defendant made a general appearance and thus waived its right to challenge proper service of process. Accordingly, we reverse the trial court's vacation of the magistrate's judgment.

Reversed and remanded.

Judges CALABRIA and LEVINSON concur.

CLAUDE QUEEN, EMPLOYEE, PLAINTIFF V. PENSKE CORPORATION, EMPLOYER, AND
KEMPER C/O GALLAGHER BASSETT, CARRIER, DEFENDANTS

No. COA05-03

(Filed 6 December 2005)

1. Workers' Compensation— back injury not resolved—need for continuing treatment—supporting evidence

There was competent evidence supporting the Industrial Commission's findings in a workers' compensation case that plaintiff's back injury continues and that his need for further medical treatment is related to that injury.

2. Workers' Compensation— back injury—future surgery—not void as conditional

The requirement in a worker's compensation order that defendant provide surgery in the future for plaintiff's back injury was supported by medical testimony about plaintiff's need for the surgery. The Commission is specifically authorized by statute to consider the possibility of future medical needs and to provide for them.

Appeal by defendants from opinion and award entered 11 October 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 August 2005.

The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Kimberly A. D'Arruda, for defendants.

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[174 N.C. App. 814 (2005)]

HUDSON, Judge.

Plaintiff Claude Queen, an employee of defendant Penske Corporation (“Penske”), claimed a back injury at work on 1 July 2002. Following a hearing on 27 June 2003, Deputy Commissioner Wanda Blanche Taylor issued an opinion and award on 30 March 2004, concluding that plaintiff had sustained a compensable back injury at work and needed medical treatment, including both conservative measures and eventual surgery. Defendants appealed, and on 11 October 2004, the Full Commission issued an opinion and award affirming the Deputy Commissioner’s opinion and award. Defendants appeal. As discussed below, we affirm.

Plaintiff is employed as an engine tuner for Penske. On 1 July 2002, plaintiff felt a sting and pop in his back while lifting a tire. Dr. Jerry Petty, a neurosurgeon, examined plaintiff and ordered an MRI. Based on the MRI, Dr. Petty recommended surgery if plaintiff’s symptoms escalated to the point where he could not walk. Dr. Petty also recommended epidural steroid injections. Plaintiff elected not to have the injections, and also expressed a desire to avoid surgery if possible.

The Full Commission made numerous findings of fact including those challenged by defendants:

2. Plaintiff had back problems that pre-existed his injury on July 1, 2002. However, these pre-existing problems were all minor and resolved quickly. In 1978, Plaintiff pulled a muscle in his back while self-employed. In approximately 1993, he hurt his back while picking up a tire. In 1999, Plaintiff hurt his neck. These pre-existing problems required only a few medical appointments each and were managed conservatively by Plaintiff’s treating neurosurgeon, Dr. Jerry Petty.

8. On July 30, 2002, Plaintiff returned to Dr. Petty and the MRI was interpreted to show degenerative changes in Plaintiff’s spine, including stenosis and bulging discs at L2-3, L3-4, and L4-5. Dr. Petty recommended epidural steroid injections for Plaintiff and also discussed surgical intervention due to the symptoms Plaintiff had experienced since his injury on July 1, 2002.

9. Plaintiff was advised that epidural steroid injections are not guaranteed to provide relief. For this reason, Plaintiff decided not to undergo these injections.

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11. Plaintiff's symptoms from his back injury come and go. Plaintiff has good days and bad days with his back pain. Although Plaintiff's pain is sometimes absent, he continues to have frequent back pain as a consequence of his injury on July 1, 2003 [sic]. Plaintiff did not experience this back pain before his injury. Despite his back pain, Plaintiff continues to work.

12. Dr. Petty opined that although Plaintiff had pre-existing stenosis and bulging discs, the injury of July 1, 2003 [sic], aggravated these pre-existing conditions and cause Plaintiff to become symptomatic since that time. At the time of the hearing before the Deputy Commissioner, Plaintiff's symptoms have not resulted in a loss of wage earning capacity that would entitle him to disability compensation under N.C. Gen. Stat. 97-28 and 97-29.

13. Dr. Petty recommended Plaintiff have surgery if he remains symptomatic. Dr. Petty opined Plaintiff's need for surgery is a proximate consequence of the specific traumatic incident he sustained on July 1, 2003 [sic], even though Plaintiff had underlying degenerative changes in his spine.

Defendants also challenged the Commission's conclusion, quoted here in pertinent part:

2. As the result of Plaintiff's compensable injury, Plaintiff needs medical treatment, including the conservative measures and surgery recommended by Dr. Jerry Petty. *See* N.C. Gen. Stat. 97-25. Plaintiff's reluctance to undergo some of this treatment does not result in a penalty against him, however, since plaintiff is not receiving disability compensation, the Commission has not ordered Plaintiff to undergo such treatment, and Plaintiff is justified in not wanting to undergo such treatment at the present time. *See* N.C. Gen. Stat. 97-25. In addition, the fact that Plaintiff's symptoms are not always present does not abate Defendants' liability for ongoing medical treatment, since such an inquiry deals not with the necessity of Plaintiff's surgery testified to by Dr. Petty but rather the question of whether a "change of condition" has occurred. . . .

We begin by noting the well-established standard of review for worker's compensation cases from the Industrial Commission. This Court does not assess credibility or re-weigh evidence; it only determines whether the record contains any evidence to support the challenged findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d

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411, 414 (1998), *rehearing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Instead, we are “limited to reviewing whether any competent evidence supports the Commission’s findings of fact and whether the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

[1] Defendants first argue that the Commission erred in finding and concluding that plaintiff’s 1 July 2002 injury continues and that his need for further medical treatment is related to that injury. We disagree.

The Worker’s Compensation Act specifies that employers provide medical compensation, defined by the Act as:

medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability

N.C. Gen. Stat. § 97-2 (19) (2003). “[A]n award for medical compensation must be limited to medical expenses reasonably related to the employee’s compensable injury.” *Errante v. Cumberland County Solid Waste Mgmt.*, 106 N.C. App. 114, 121, 415 S.E.2d 583, 587 (1992). Defendants contend that plaintiff’s back injury had resolved prior to the hearing, and that any future medical treatments he might require were unrelated to his compensable injury.

However, Dr. Petty’s deposition contains competent evidence that plaintiff’s back problems continued and that the future medical treatments Dr. Petty recommended were related to the 1 July 2002 injury:

[Plaintiff’s counsel] Q: . . . [after summarizing plaintiff’s medical history]. Based on those set of facts or assuming those facts are accurate or true, *do you have an opinion as to whether it’s more likely than not that Mr. Queen either sustained an injury on July 1, 2002, or aggravated a pre-existing condition on July 1, 2002, causing the treatment you have now recommended?*

A. I—I do not know exactly how much back trouble he had had prior to the time he lifted the tire. He didn’t see me for it if he had back trouble and *I think that if he had no pain prior to the time he lifted the tire and he had pain after he lifted the tire, I think it’s related to lifting the tire.*

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Q: Okay. And would you think that the treatment that you have recommended, including the epidural steroid injection, that recommendation, as well as the possibility of future surgery, are as a result of this July 1, 2002, incident or the aggravation of this pre-existing condition?

A. I think that if he had surgery, it would be for the lumbar spinal stenosis, which is congenital, and I think the reason he'd have to have surgery is because that—either that got worse or he kept injuring himself trying to do the type of work he does.

(Emphasis supplied). These excerpts from Dr. Petty's deposition provide competent evidence which supports the findings challenged by defendants. Because we do not reweigh the evidence, but merely determine whether any competent evidence supports the findings, we overrule this assignment of error.

[2] Defendants also argue that the Commission erred in finding and concluding that defendants must provide surgery at some point in the future. We disagree.

Defendants contend that any future surgery plaintiff might require is merely a possibility at this time and that the Commission's order must be void as conditional. However, this eventuality is provided for by statute. The Worker's Compensation Act states, in pertinent part, that:

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. *If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.*

N.C. Gen. Stat. § 97-25.1 (2003) (emphasis supplied). Thus, the Commission is specifically authorized to consider the possibility of future medical needs and to provide for them in awards. In addition, the Act provides that:

Medical compensation shall be provided by the employer. Notwithstanding the provisions of G.S. 8-53, any law relating to

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the privacy of medical records or information, and the prohibition against ex parte communications at common law, an employer paying medical compensation to a provider rendering treatment under this Chapter may obtain records of the treatment without the express authorization of the employee. *In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.*

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

N.C. Gen. Stat. § 97-25 (2003). “Whether to authorize supplemental medical treatment under section 97-25 is a matter firmly within the Commission’s discretion. A discretionary ruling will be upheld on appeal, provided that the decision was reasonable and was not whimsical or ill-considered.” *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 360, 542 S.E.2d 668, 675, disc. review denied, 353 N.C. 450, 548 S.E.2d 524 (2001) (internal citation omitted). Given the testimony from Dr. Petty about defendant’s possible need for back surgery in the future and the findings and conclusions based thereupon, we conclude that the Commission’s decision was reasonable.

Affirmed.

Judge TIMMONS-GOODSON concurred prior to 31 October 2005.

Judge ELMORE concurs.

BOND/TEC, INC. v. SCOTTSDALE INS. CO.

[174 N.C. App. 820 (2005)]

BOND/TEC, INC., PLAINTIFF v. SCOTTSDALE INSURANCE COMPANY, DEFENDANT

No. COA04-1591

(Filed 6 December 2005)

Insurance— commercial liability policy—voluntary payments clause—summary judgment incorrectly granted

Summary judgment should not have been granted for defendant-insurance company for breach of a voluntary payments clause where plaintiff began to install a roof on a school, the temporary seal leaked, plaintiff hired a company to clean up the water damage, and defendant denied coverage. Even assuming a breach of the voluntary payments clause, defendant is not entitled to summary judgment because it made no showing of prejudice.

Appeal by plaintiff from order entered 4 October 2004 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 17 August 2005.

Law Offices of J. Darren Byers, PA, by J. Darren Byers, for plaintiff-appellant.

Wilson & Iseman, LLP, by G. Gray Wilson and David R. Fothergill, for defendant-appellee.

ELMORE, Judge.

Bond/Tec, Inc. (plaintiff) appeals an order of summary judgment entered in favor of Scottsdale Insurance Company (defendant) on plaintiff's claim for breach of insurance contract. Plaintiff entered into a contract with the Newton-Conover City Schools for the re-roofing of Newton-Conover High School on or about 11 June 2003. The contract price was \$174,405.00, and plaintiff was required to post a performance bond of \$50,000.00, which was to be held in escrow until completion of the work to ensure plaintiff's "satisfactory and timely finishing of the project." As stated in plaintiff's complaint, the school incurred over \$49,200.00 in property damage after temporary "tie-offs" plaintiff used to seal the roof of the school at night failed and rain water leaked into the school building. Plaintiff contacted defendant in an effort to obtain coverage for the property damage. On or about 9 July 2003, plaintiff's president, Joe Bond (Mr. Bond), hired Servpro to clean up water damage caused by the leaking roof at

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Newton-Conover High School. The Servpro invoice stated that Mr. Bond had said “that he would pay for this [water] damage out of his own pocket.” According to defendant, on 14 July 2003 defendant sent a letter to plaintiff and school administrators denying coverage. In a letter dated 18 July 2003, the architect on the job, Robert L. Clark, advised plaintiff to confer with defendant “and get this settled A.S.A.P. since school starts again the first week in August and students will have to occupy these [damaged] rooms, use the computers, etc.” The letter went on to remind plaintiff that the Newton-Conover School Board held plaintiff’s \$50,000.00 certified check as security to ensure satisfactory completion of the work.

In a letter dated 25 July 2003, the Superintendent of Newton-Conover City Schools summarized the discussion between school administrators and Mr. Bond that had occurred earlier that day. The letter stated that Mr. Bond had verbally agreed to pay for the full replacement cost of numerous items that were damaged by the water leakage. Mr. Bond stated in an affidavit that he agreed to pay the school system for the water damage in an effort to protect the performance bond.

Plaintiff commenced this action on 26 February 2004, alleging that defendant breached the parties’ commercial general liability insurance policy (policy) and seeking recovery of at least \$49,000.00. Defendant filed a motion for summary judgment contending, *inter alia*, that plaintiff “paid a claim for which it was not responsible as a volunteer.” On 28 September 2004 Mr. Bond submitted an affidavit in which he stated that he had hired Servpro for the purpose of preventing mold and mildew damage and that he “in no way agreed to pay Servpro or any other company or entity to make any other repairs prior to the insurance claim being denied.” On 4 October 2004 the trial court granted defendant’s motion for summary judgment, and on 13 October 2004 plaintiff filed notice of appeal to this Court.

Plaintiff contends that the trial court erred in granting defendant’s motion for summary judgment because genuine issues of material fact exist as to whether plaintiff’s payment was voluntary. When considering a motion for summary judgment, a trial court must resolve all inferences against the moving party and accept as true the facts asserted by the nonmovant. *See Holley v. Burroughs Welcome Co.*, 318 N.C. 352, 356, 348 S.E.2d 772, 774 (1986). A moving party can meet its burden under N.C.R. Civ. P. 56(c) “(1) by showing that an essential element of the opposing party’s claim is nonexistent; or (2) demonstrating that the opposing party cannot produce evidence suf-

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ficient to support an essential element of the claim or overcome an affirmative defense which would work to bar his claim.” *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 89, 464 S.E.2d 299, 300 (1995).

Defendant asks this Court to affirm the order of summary judgment on the basis that plaintiff breached the voluntary payments clause of the parties’ policy and thus defendant has no obligation to reimburse plaintiff. The policy provides in pertinent part as follows:

c. You and any other involved insured must:

...

(3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”[.]

...

d. No insured will, except at that insured’s own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Defendant contends that plaintiff made a voluntary payment to the school for its loss and that this action breached the voluntary payments clause of the parties’ contract. Specifically, defendant asserts that plaintiff’s decision to reimburse the school for its loss was unilaterally undertaken before defendant informed plaintiff on 14 July 2003 of the denial of the claim. However, the record is lacking of evidence beyond factual dispute to establish plaintiff’s voluntary payment or agreement to pay prior to the denial of the claim. A claims representative for defendant stated in an affidavit that defendant sent a letter on 14 July 2003 denying coverage. The only undisputed evidence of payment or agreement to pay by plaintiff is the 25 July 2003 letter from the Superintendent of Newton-Conover schools. Plaintiff’s agreement in this letter, and any subsequent payment in accordance with the agreement, occurred after defendant denied coverage on 14 July 2003.¹

1. Defendant does not argue that plaintiff’s agreement in the 25 July 2003 letter was a breach of the voluntary payments clause of the policy. Indeed, courts have held that an insured’s unauthorized settlement payment made after an insurer’s denial of a claim does not relieve the insurer of its obligations. See *Franklin v. Oklahoma City Abstract & Title Co.*, 584 F.2d 964, 968 (10th Cir. 1978) (“provisions prohibiting out-of-court settlements between an insured and a claimant without the consent of the insurer are not enforced when the insurer repudiates coverage or denies liability”); *Bunge Corp. v. London & Overseas Ins. Co.*, 394 F.2d 496, 497 (2nd Cir. 1968) (after insurer denies liability, insured may settle with third party without prejudicing its rights against insurer).

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The evidence regarding plaintiff's agreement to pay in the Servpro invoice dated 9 July 2003 is in dispute. Defendant contends that the invoice establishes an agreement by plaintiff to pay the school for its damages. In contrast, plaintiff argues that it did not agree in this invoice to pay for any repairs beyond those handled by Servpro. The total amount listed on the Servpro invoice was \$9,630.57. The notation on the invoice merely stated that plaintiff's president "would pay for this damage out of his own pocket." If plaintiff did in fact agree to pay all Servpro repairs at its own cost, then plaintiff did not assume an obligation in violation of the voluntary payments clause. As the trial court must resolve all inferences against the moving party, *see Holley*, 318 N.C. at 355-56, 348 S.E.2d at 774, summary judgment could not be properly granted to defendant based upon plaintiff's agreement with Servpro.

Moreover, assuming *arguendo* that plaintiff did breach the voluntary payments clause, defendant would not automatically be relieved of its obligation to reimburse plaintiff. In *Henderson v. Insurance Co.*, 254 N.C. 329, 118 S.E.2d 885 (1961), our Supreme Court determined that insurance contract provisions which are conditions to liability under the contract would be interpreted consistent with the purpose underlying them:

The provisions are to be given a reasonable interpretation to accomplish the purpose intended, that is, to put insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and to cooperate fairly and honestly with the insurer in the defense of any action which may be brought against insured, and upon compliance with these provisions to protect and indemnify within the policy limits the insured from the result of his negligent acts. **An insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial.**

Henderson, 254 N.C. at 332, 118 S.E.2d at 887 (emphasis added). *Henderson* involved the insured's alleged breach of the cooperation clause of an insurance contract. *See id.* This Court has not addressed whether a breach of a voluntary payments clause by an insured relieves the insurer of liability. However, in *Branch v. The Travelers Indemnity Co.*, 90 N.C. App. 116, 119, 367 S.E.2d 369, 371 (1988), *aff'd*, 324 N.C. 430, 378 S.E.2d 748 (1989), the Court stated that the failure of an insured to comply with the "consent to settle" provision

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of an insurance contract does not relieve the insurer of its obligation to pay underinsured motorist coverage. Also, this Court has stated that where an insured fails to give timely notice of a suit against the insured, the insurer must show material prejudice in order to be relieved of its obligation to pay the claim. *See, e.g., Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 122 N.C. App. 449, 452-53, 470 S.E.2d 556, 558 (1996) (where notice was given as soon as practicable or insured shows good faith for delay, insurer must show that its ability to investigate and defend was materially prejudiced).

Thus, in North Carolina an insurer may not rely upon the breach of consent-to-settlement, notice, or cooperation provisions in order to relieve itself of liability to pay the claim; the insurer must demonstrate prejudice to its ability to investigate or defend the claim. By analogy, we conclude an insurer must show prejudice where the insured has breached the voluntary payments clause of the parties' insurance contract. Defendant has not demonstrated that plaintiff's actions prevented defendant from investigating or litigating the claim. *Cf. South Carolina Ins. Co. v. Hallmark Enterprises*, 88 N.C. App. 642, 649-50, 364 S.E.2d 678, 682 (insurer prejudiced by insured's breach of notice provision where insured entered into valid and enforceable default judgment before giving notice of suit; insurer prevented from investigating or litigating the action), *disc. review denied*, 322 N.C. 482, 370 S.E.2d 228 (1988); *Augat, Inc. v. Liberty Mut. Ins. Co.*, 571 N.E.2d 357, 361 (Mass. 1991) (insurer prejudiced by insured's breach of voluntary payment clause where insured entered into consent judgment); *Liberty Mut. Ins. Co. v. Cruz*, 883 S.W.2d 164, 166 (Tex. 1993) (insurer prejudiced as a matter of law where insurer not notified of suit until after default judgment became final). As defendant has made no showing of how it was prejudiced by plaintiff agreeing to pay for a portion of the repairs, it is not entitled to summary judgment on the basis of plaintiff's violation of the voluntary payments clause. In sum, we determine that the trial court erred in entering summary judgment for defendant because there is a genuine issue of material fact as to whether plaintiff breached the voluntary payments clause and because defendant has not shown prejudice as a result of any breach.

Reversed and remanded.

Judges CALABRIA and GEER concur.

N.C. DEP'T OF TRANSP. v. STAGECOACH VILLAGE

[174 N.C. App. 825 (2005)]

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, PLAINTIFF V.
STAGECOACH VILLAGE, A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA03-1026-2

(Filed 6 December 2005)

1. Parties— necessary—homeowners association—individuals

Necessary parties are those so vitally interested that a valid judgment finally determining the controversy cannot be rendered without them. The trial court here did not err by concluding that individual lot owners with easements over a common area taken by DOT are necessary; the owners of the easements have a material interest in receiving just compensation for their easements.

2. Parties— proper—individual lot owners—common area taken by DOT

The trial court did not abuse its discretion by concluding that individual lot owners in a subdivision were proper parties to an action involving the taking of common area property by DOT.

3. Jurisdiction— standing—homeowners association

A homeowners association did not have standing to pursue individual lot owners' claims where the individual lot owners were necessary parties.

Appeal by Plaintiff from order entered 27 March 2003 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 18 May 2004. A unanimous panel of this Court dismissed the appeal as interlocutory and not affecting a substantial right. *See N.C. Dep't of Transp. v. Stagecoach Vill.*, 166 N.C. App. 272, 601 S.E.2d 279 (2004). By opinion filed 7 October 2005, the Supreme Court of North Carolina reversed and remanded to this Court to determine Plaintiff's appeal on the merits. *See N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 619 S.E.2d 495 (2005).

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker and Special Deputy Attorney General W. Richard Moore, for plaintiff-appellant.

Horsley & Peraldo, P.A., by Jeffrey K. Peraldo, and Smith Moore LLP, by Bruce P. Ashley and R. James Cox, Jr., for defendant-appellee.

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WYNN, Judge.

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968). Plaintiff contends that the individual lot owners who have a recorded easement in the condemned common area are not necessary parties for a determination of the just compensation for the common areas. As we hold those owners of the easement have a material interest in the subject matter of the controversy, receiving just compensation for their individual easement, and their interest will be directly affected by the trial court's decision, the trial court did not err in concluding they are necessary and proper parties.

The procedural and factual history of the instant appeal is as follows: On 15 January 2002, the Plaintiff, North Carolina Department of Transportation (DOT), filed a complaint for condemnation, declaration of taking, and notice of deposit in Superior Court, Guilford County regarding certain property owned by the Defendant Homeowner's Association, Stagecoach Village. The property at issue was common area property owned by Stagecoach Village in which each lot owner of the Stagecoach Village townhouse development also owned an easement. In its answer to DOT's complaint, Stagecoach Village asserted the individual lot owners were necessary parties to the condemnation action inasmuch as each lot owner's property rights were adversely affected by the taking. On 9 October 2002, Stagecoach Village filed a motion pursuant to section 136-108 of the North Carolina General Statutes for a determination, *inter alia*, of whether the individual lot owners were necessary parties to the condemnation action. The motion came before the trial court on 16 December 2002, following which the trial court entered an order joining as necessary parties every record owner of a lot in the Stagecoach Village townhouse development. DOT appealed from this order. This Court dismissed the appeal as interlocutory and not affecting a substantial right. *See N.C. Dep't of Transp. v. Stagecoach Vill.*, 166 N.C. App. 272, 601 S.E.2d 279 (2004). The North Carolina Supreme Court reversed this Court and held a substantial right existed because "[t]he possible existence of an easement . . . is a question affecting title[.]" *See N.C. Dep't of Transp. v. Stagecoach Vill.*,

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360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005)¹. By opinion filed 7 October 2005, our Supreme Court remanded to this Court to determine DOT's appeal on the merits.

On appeal, DOT argues that the trial court erred in concluding as a matter of law that (1) each individual record owner of a lot in the Stagecoach Village townhouse development must be joined as defendants, and (2) Stagecoach Village does not have standing to pursue each individual lot owner's claim.

[1] DOT contends that the trial court erred in concluding as a matter of law that each individual record owner of a lot in the Stagecoach Village townhouse development is a necessary and proper party and must be joined as defendants. We disagree.

Rule 19 of the North Carolina Rules of Civil Procedure provides for the necessary joinder of parties, in pertinent part: "Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants[.]" N.C. Gen. Stat. § 1A-1, Rule 19(a) (2004). Necessary parties must be joined in an action. *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978). Proper parties may be joined. *Id.* Whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316.

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Id.*; *Manning v. Hart*, 255 N.C. 368, 372, 121 S.E.2d 721, 725 (1961). "The term 'necessary parties' embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be

1. The parties do not dispute the existence of the easements in this matter. Indeed, DOT acknowledges in its brief that the "Declaration for each phase establishes that each owner of a lot has rights in the Common Area of the Stagecoach Village development . . ." under Article II which states:

Every Owner shall have a right and easement of enjoyment in and to the Common Area which shall be appurtenant to and shall pass with the title to every Lot . . .

Thus, the issue here does not concern the affectation of title to the easements, which is admittedly a matter of right for each owner. Instead the issue is whether the owners of easements must be joined as parties. We therefore read the mandate of our Supreme Court reinstating this appeal to reinvigorate the language under *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) that interlocutory orders concerning "what land . . . is condemn[ed]" must be immediately appealed as "vital preliminary issues" involving substantial rights affected.

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directly affected by an adjudication of the controversy.” *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) (citation omitted). When a complete determination of the matter cannot be had without the presence of other parties, the trial court must cause them to be brought in. *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316. A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others. *Id.*

The parties in the instant action seek a determination of the just compensation for DOT’s taking of land whose record title is held by Stagecoach Village and each lot owner in the development has an easement in the entire common area. The trial court made a finding of fact that each lot owner has an easement property right of record in the condemned common area. The trial court also concluded as a matter of law:

7. Each individual lot owner’s claim is not common with the entire membership and is not shared equally. Depending upon the lot owner’s location in the development, the lot owner may be more or less damaged by the taking than other lot owners. Individualized proof on each lot owner’s damages will be necessary. The proper parties to provide this proof are the individual lot owners.

A suit as to the just compensation of the condemned land cannot be resolved without the joinder of each lot owner in the development who has an easement property right of record. Those owners of the easement have a material interest in the subject matter of the controversy, receiving just compensation for their individual easement, and their interest will be directly affected by the trial court’s decision. *See Wall*, 13 N.C. App. at 724, 187 S.E.2d at 457; *see also Rice v. Randolph*, 96 N.C. App. 112, 114, 384 S.E.2d 295, 297 (1989) (action determining whether an easement had been extinguished, record owners of lots in the subdivision, who had user rights in the easement, were necessary parties).

[2] Moreover, the trial court concluded that each individual lot owner is also a proper party. Whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Strickland*, 273 N.C. at 485, 160 S.E.2d at 316. As the trial court’s decision is not manifestly unsupported by reason, the trial court did not abuse its discretion.

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[174 N.C. App. 829 (2005)]

[3] Finally, DOT argues that the trial court erred in concluding as a matter of law that Stagecoach Village does not have standing to pursue each individual lot owner's claim. We disagree.

This Court has previously set out:

'[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) *neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.*'

Creek Pointe Homeowner's Ass'n, Inc. v. Happ, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001) (internal quotation omitted) (emphasis added). As we have already determined that the individual lot owners are necessary parties to the action, the trial court did not err in concluding that Stagecoach Village does not have standing to pursue each individual lot owner's claim. *Id.*

Affirmed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. SHARUN BERNARD SIMS

No. COA04-1170

(Filed 6 December 2005)

1. Drugs— conspiracy to traffic in more than 400 grams of cocaine—confession—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic in more than 400 grams of cocaine, because: (1) our Supreme Court has held that in non-capital cases where the State relies upon defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the corpus delicti of the crime charged if the accused's confession is supported by independent evidence tending to establish its trustworthiness; (2) defendant's statements that he had purchased a half kilo (500 grams) of cocaine from a Mexican on three occasions provided sufficient

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evidence; and (3) two items of independent proof establish the trustworthiness of defendant's statement including that a substantial quantity of cocaine was found in defendant's possession at the time of his arrest and a controlled buy was conducted prior to the search of defendant's home in which an informant purchased twenty-six grams of cocaine from defendant in his home.

2. Sentencing— mitigating factors—rendered substantial assistance leading to the identification, arrest, or conviction of any accomplices, accessories, or coconspirators—abuse of discretion standard

The trial court did not abuse its discretion in a drug case by failing to find that defendant rendered substantial assistance leading to the identification, arrest, or conviction of any accomplices, accessories, or coconspirators, because defendant made no showing that the trial court's failure to find that defendant rendered substantial assistance could not have been the result of a reasoned decision.

Appeal by defendant from judgments entered 5 August 2003 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 16 August 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Barry H. Bloch, for the State.

Winifred H. Dillon for defendant-appellant.

HUNTER, Judge.

Sharun Bernard Sims ("defendant") appeals from judgments dated 5 August 2003 entered consistent with jury verdicts finding defendant guilty of trafficking in cocaine by possession of at least 200 grams but less than 400 grams, conspiracy to traffic in cocaine by possessing more than 400 grams, maintaining a dwelling for the keeping or selling of a controlled substance, and trafficking in cocaine by manufacturing at least 200 but less than 400 grams. For the following reasons, we find no error.

The State presented evidence tending to show that on 24 September 2002, a confidential informant made a controlled buy of about twenty-six grams of cocaine from an inhabitant of 3615 Irwin Street in Greensboro. The Greensboro Police Department subsequently searched the residence pursuant to a warrant. Present in the

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residence at the time of the search were its residents: Defendant, his female companion, and their child. After defendant was handcuffed, he nodded toward the kitchen and stated, “it’s all inside there.” The officers found in the kitchen cabinets a red bag containing 181.8 grams of powder cocaine, 4.5 grams of cocaine base, razor blades, and a digital scale. As the search proceeded, defendant made a statement acknowledging that the drugs were his. Later, at the police station, defendant made another statement indicating that the cocaine found in the house was the remainder of a half kilo of cocaine he had obtained from “a Mexican.” Defendant offered no evidence at trial.

I.

[1] Defendant first contends that the trial court erred by denying his motion to dismiss the charge of conspiracy to traffic in more than 400 grams of cocaine. Defendant argues that his statement that he obtained half a kilo from an unidentified Mexican is insufficient evidence to establish a conspiracy to traffic in more than 400 grams of cocaine. Specifically, defendant contests the sufficiency of evidence as to the amount of cocaine.¹ Relying upon *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985), he submits that other corroborating evidence besides a naked confession must be presented. We disagree.

A motion to dismiss requires the court to determine whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). This determination is made after considering the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). “Contradictions or discrepancies in the evidence must be resolved by the jury[.]” *State v. Thompson*, 157 N.C. App. 638, 642, 580 S.E.2d 9, 12 (2003).

In *State v. Parker*, our Supreme Court addressed the issue of whether there “must be direct or circumstantial proof of the *corpus delicti* independent of the defendant’s confession in order to sustain a conviction.” *Parker*, 315 N.C. at 227, 337 S.E.2d at 490. The Court in *Parker* determined that while the rule was universal that an “extrajury-

1. We note that defendant also attempts to argue in his brief that insufficient evidence was presented to show an agreement between defendant and the unknown seller of the cocaine. Defendant did not present this issue to the trial court. As this issue was not properly preserved for our review, we do not address defendant’s arguments as to the sufficiency of the evidence as to the agreement. N.C.R. App. P. 10(b).

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dicial confession, standing alone, is not sufficient to sustain a conviction of a crime[.]” lines of authority differed as to the “quantum and type of corroboration necessary[.]” *Id.* at 229, 337 S.E.2d at 491 (footnote omitted). After reviewing the types of corroboration and justifications for each rule used in other jurisdictions, our Supreme Court adopted the federal rule as set out in *Opper v. United States*, 348 U.S. 84, 99 L. Ed. 101 (1954). *Parker*, 315 N.C. at 236, 337 S.E.2d at 495. The Supreme Court of North Carolina held that, in non-capital cases, “when the State relies upon the defendant’s confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused’s confession is supported by substantial independent evidence tending to establish its trustworthiness[.]” *Id.*

In *Parker*, the defendant made an extrajudicial confession to two murders, and confessed to robbing one of the victims of ten dollars. *Id.* at 237, 337 S.E.2d at 495-96. Substantial corroborating evidence was found of the defendant’s confession as to the murders, including the bodies of the victims in the condition described by the defendant, the murder weapon, and recovery of bloody clothing. *Id.* A wallet belonging to one of the victims was recovered from a neighbor of the defendant’s girlfriend. *Id.* at 237, 337 S.E.2d at 496. The Court found that although there was no independent evidence to prove the *corpus delicti* of the armed robbery of one of the victims, the corroboration of the other details of the defendant’s confession established the trustworthiness of the statement, and the confession was sufficient to sustain the defendant’s conviction for armed robbery. *Id.* at 238-39, 337 S.E.2d at 496-97.

Here, defendant was charged with conspiracy to traffic a controlled subject pursuant to N.C. Gen. Stat. § 90-98, specifically the possession of more than 400 grams of cocaine. Evidence to support this charge was presented by the State in the form of statements by defendant. Following a controlled buy from defendant of twenty-six grams and a search of defendant’s residence which revealed 181.8 grams of cocaine, defendant was advised of his Miranda rights and agreed to answer questions. Defendant admitted that the drugs were his, but stated that counterfeit money discovered in the residence belonged to a former resident named Tim. Defendant also answered inquiries about currency-sized cut-up pieces of newspaper found in the kitchen, stating that he had been “ripped off by another drug dealer and that they had paid him in newspaper.” Defendant was then transported to the police department and interviewed after again

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being advised of his Miranda rights, which defendant waived. Defendant again stated that the cocaine in the house was his, and that what was found was the remainder of “a half of [a] kilo he purchased from a Mexican.” Defendant stated that he had purchased a half kilo from the Mexican on three previous occasions, but could no longer purchase from him because of an argument over the quality of the last kilo. Defendant also informed the questioning officers of a location where they might find the vehicle the Mexican drove, although the officers were unable to later locate the vehicle at that location.

Defendant’s statements that he had purchased a half kilo (500 grams) of cocaine from a Mexican on three occasions provided sufficient evidence of defendant’s conspiracy to traffic in more than 400 grams of cocaine. Two items of independent proof establish the trustworthiness of defendant’s statement.

First, a substantial quantity of cocaine, 181 grams, was found in defendant’s possession at the time of his arrest. Our courts have consistently held that one’s possession of a substantial quantity of a controlled substance is sufficient to support a reasonable inference that the possessor intended to sell or deliver the substance. *Morgan*, 329 N.C. at 659, 406 S.E.2d at 835.

Additionally, a “controlled buy” was conducted prior to the search of defendant’s home in which an informant purchased twenty-six grams of cocaine from defendant in his home. Paraphernalia associated with trafficking was also found in the home, including razor blades and a digital scale. Such substantial independent proof tends to establish the trustworthiness of defendant’s statement as to the quantity of cocaine, and provides sufficient evidence to deny a motion to dismiss. This assignment of error is overruled.

II.

[2] Defendant finally contends the trial court abused its discretion in failing to find he rendered substantial assistance leading to the identification, arrest, or conviction of any accomplices, accessories, or co-conspirators, affecting his sentence as to all judgments from which he appeals. As defendant acknowledges, the decision whether or not to find that a defendant rendered substantial assistance is addressed to the discretion of the trial judge. *State v. Wells*, 104 N.C. App. 274, 276, 410 S.E.2d 393, 394 (1991). The court’s decision will not be disturbed unless it is shown that the court’s decision was so arbitrary that it could not have been the result of a reasoned deci-

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sion. *State v. Hayes*, 314 N.C. 460, 473, 334 S.E.2d 741, 749 (1985). Defendant makes no showing that the trial court's failure to find that defendant rendered substantial assistance could not have been the result of a reasoned decision. We, therefore, find no abuse of discretion.

No error.

Judges McGEE and LEVINSON concur.

WALKER F. CROCKER CAUDLE GIBBONEY, PLAINTIFF V. WACHOVIA BANK, N.A., IN ITS CAPACITY AS EXECUTOR OF THE ESTATE OF LARRY W. CAUDLE, DECEASED, VELLER CAUDLE BOONE, RUTH CAUDLE BAITY, RAYMOND C. CAUDLE, ROBERT C. CAUDLE, EDGAR H. CAUDLE, MELISSA B. HARRELSON, L. CLAY WOOTEN, BARBARA WOOTEN McDONALD, PAULINE WOOTEN CHEEK, BERNICE WOOTEN JONES, LOIS WOOTEN BECK, FLORINE WOOTEN GUEVARRA, CHARLES HERMAN WOOTEN, BETTY WOOTEN HOLDER, BOBBY LEE WOOTEN, NANCY WOOTEN RIST, JERRIE WOOTEN LEWIS AND KAREN WOOTEN HAZEN, DEFENDANTS

No. COA04-1636

(Filed 6 December 2005)

Wills—divorced spouse—unchanged will

The language of N.C.G.S. § 31-5.4 clearly mandates that a former spouse is denied any testate disposition unless the testator clearly indicates in the will that he or she would remain a beneficiary even if they divorced. Neither of the provisions of the will cited by the plaintiff in this case so provides, and summary judgment should not have been granted for plaintiff. Although North Carolina has a long-standing policy of avoiding intestate succession, a will cannot be construed to conflict with a clear legislative mandate.

Appeal by defendants from judgment entered 17 September 2004 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 June 2005.

Gabriel, Berry, & Weston, L.L.P., by M. Douglas Berry for plaintiff-appellee.

Browne, Flebotte, Wilson, Horn & Webb, by Daniel R. Flebotte, for defendants-appellants.

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CALABRIA, Judge.

The surviving next of kin (“defendants”) of Larry W. Caudle (“decedent”) appeal a summary judgment order declaring Walker F. Crocker Caudle Gibboney (“plaintiff”) the sole beneficiary under the terms of decedent’s will. We reverse.

From 1962 until 1975, plaintiff and decedent (collectively “the parties”) either dated or remained “good friends,” until decedent proposed to plaintiff in June 1975. During the time the parties were “simply in a dating relationship,” decedent executed a will dated 25 May 1973. Article II of the will set forth four (4) mutually exclusive tiers of contingent dispositions in descending order of priority, paraphrased as follows:

1st: to a surviving wife, lawfully married to decedent on his death date, “absolutely and in fee simple forever”; or

2nd: if no surviving wife, to decedent’s surviving children in equal shares fee simple absolute, or *per stirpes* to the issue of decedent’s deceased children; or

3rd: if no surviving wife, children, or issue of deceased children, to decedent’s parents, Edward W. Caudle and Treva W. Caudle, in equal shares, or to the survivor, in fee simple absolute; or

4th: if none of the above persons survive decedent, to “Miss Walker F. Crocker, of Greensboro, North Carolina, if she shall survive decedent in fee simple absolute.”

The will failed to include a specific residuary clause.

The parties were married on 20 September 1975, separated on 19 September 1995, and later divorced on 24 February 1997. They executed a property settlement agreement in which they agreed first, to divide their marital assets and second, not to “make any claim for any interest or estate whatsoever in or to any property, real, personal, or mixed, which the other now owns or hereafter acquires.” Decedent died on 11 October 2003 predeceased by his parents. He never changed his will, never remarried, and never had children.

The executor indicated decedent’s estate would pass intestate by operation of law. The application for probate and letters testamentary included an addendum listing decedent’s surviving paternal and maternal next of kin (“next of kin”). Plaintiff filed a complaint on 23 April 2004, seeking entry of a declaratory judgment regarding the con-

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struction and interpretation of decedent's will, specifically that she was the sole surviving beneficiary. In a motion for summary judgment, plaintiff asserted there was "no genuine issue as to any material fact affecting [her] entitlement to a declaratory judgment declaring [her] to be the sole residual beneficiary" under decedent's will. On 17 September 2004, the trial court granted summary judgment, declaring plaintiff the sole residual beneficiary. All defendants except Wachovia Bank appeal.

Defendants argue the court erred in granting plaintiff's motion for summary judgment by failing to conclude that the provisions of the will in favor of plaintiff were revoked by N.C. Gen. Stat. § 31-5.4. We agree.

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). When a trial court rules on a motion for summary judgment, "the evidence is viewed in the light most favorable to the non-moving party," *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986), and all inferences of fact must be drawn against the movant and in favor of the nonmovant. *Floyd v. McGill*, 156 N.C. App. 29, 35, 575 S.E.2d 789, 793 (2003).

If possible, the court's duty is to render a will operative rather than invalid. *Stephenson v. Rowe*, 315 N.C. 330, 335, 338 S.E.2d 301, 304 (1986). The testator's intent is "the polar star which is to guide [the courts] in the interpretation of all wills[.]" *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960). In construing a will, we also consider established rules of law and public policy. *Stephenson*, 315 N.C. at 335, 338 S.E.2d at 304 (1986). North Carolina General Statutes § 31-5.4 (2003) expressly provides:

[d]issolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, *unless otherwise specifically provided in the will*, it revokes *all provisions* in the will in favor of the testator's former spouse or purported former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse or purported former spouse and any appointment of the former spouse or purported former spouse as executor, trustee, conservator, or guardian. If provisions are

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revoked solely by this section, they are revived by the testator's remarriage to the former spouse or purported former spouse.

(Emphasis added.)

In accordance with this statute, we consider whether decedent "otherwise specifically provided" for plaintiff to take under his will in a manner rendering the automatic revocation provision of N.C. Gen. Stat. § 31-5.4 inoperative upon the parties' divorce. Plaintiff argues the first and fourth dispositional tiers satisfy the exception provisions. Specifically, plaintiff asserts the will's terms create the following alternative disposition of decedent's estate: the first tier provides for plaintiff only if she was legally married to decedent upon his death and the fourth tier operates as a final, residual disposition specifically to plaintiff in the event there were no beneficiaries available to take under the prior three tiers, including plaintiff as a lawfully wedded spouse under the first tier. We hold that plaintiff's argument is unavailing.

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Thus, the statute "must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). The language of N.C. Gen. Stat. § 31-5.4 (2003) that "unless otherwise *specifically* provided [dissolution of marriage by divorce] revokes *all provisions* in the will in favor of the testator's former spouse," clearly mandates that unless the testator expressly indicates in his will that even if he divorces his spouse she would remain a beneficiary, the former spouse is denied any testate disposition. In this case, the decedent failed to so provide. Neither of the provisions of the will cited by plaintiff expressly provides, as required by statute, that if decedent divorces plaintiff, plaintiff would take any testamentary disposition. Absent such a statement in decedent's will, plaintiff has not satisfied the requirements of N.C. Gen. Stat. § 31-5.4.

While we agree with plaintiff that this State has a long-standing policy to construe a will so as to avoid the intestate distribution of any part of a testator's property, *see Misenheimer v. Misenheimer*, 312 N.C. 692, 325 S.E.2d 195 (1985), we cannot affirm a construction of a will that conflicts with the clear legislative mandate of N.C. Gen. Stat. § 31-5.4. Because we hold decedent's will failed to specifically

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provide for plaintiff in a manner rendering the automatic revocation provisions of N.C. Gen. Stat. § 31-5.4 inoperative, we do not reach the issue of what impact the parties' property settlement agreement otherwise had on plaintiff's ability to take under this will.

We reverse the trial court's summary judgment finding plaintiff the sole beneficiary under the decedent's will and remand for entry of summary judgment in favor of defendants.

Reversed and remanded.

Judges ELMORE and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ANDREWS v. SMITH No. 04-1658	Robeson (02CVS3623)	Affirmed
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DAHER v. DAHER No. 05-285	Mecklenburg (99CVD18510)	Dismissed
HARGROVE v. HOWARD No. 04-1148	Richmond (03CVS340)	Affirmed
HELTON v. N.C. DEPT OF CORR. No. 05-235	Ind. Comm. (I.C. #TA-16952)	Affirmed
IN RE C.T.A. No. 04-1400	Rutherford (01J131) (01J132) (01J133) (01J135) (01J136)	Affirmed
IN RE H.D. No. 05-302	Gaston (04J216)	Affirmed
IN RE J.L.B. No. 05-120	Forsyth (03J6)	Dismissed
IN RE L.C., I.C., L.C. No. 05-471	Durham (02J248) (02J249) (02J250)	Reversed and remanded
IN RE R.A.L. No. 05-50	Cleveland (03J164)	Reversed and remanded
IN RE T.N.W. No. 05-507	Wake (03J512)	Affirmed
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MULLINEX v. MABRY No. 04-1301	Montgomery (01CVS602)	Affirmed in part, reversed in part
REAVES v. REAVES No. 05-2	Halifax (93CVD1443)	Reversed and remanded
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STATE v. ELDER No. 05-313	Cabarrus (03CRS3875)	No error
STATE v. HANNA No. 05-517	Mecklenburg (03CRS15630) (03CRS209648)	No error
STATE v. HARRIS No. 05-834	Washington (03CRS50470)	Reversed and remanded
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STATE v. KING No. 05-74	Wayne (03CRS54530) (03CRS57326) (03CRS57578)	No error
STATE v. LOCKLEAR No. 04-1577	Scotland (00CRS22) (00CRS23)	No error at trial. Remanded for resentencing
STATE v. MILES No. 04-1286	Caswell (03CRS50659)	No error
STATE v. ORTIZ No. 05-516	Onslow (03CRS57656) (03CRS57739)	No error
STATE v. PORTER No. 04-1332	Mecklenburg (03CRS253533)	No error
STATE v. ROBERSON No. 04-1645	Durham (02CRS47701)	No error at trial, remand for resentencing

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STATE v. WILLIAMS No. 04-1389	Wake (03CRS10750)	Affirmed
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Appealability—change of venue for incorrect county denied—substantial right—The denial of a motion for change of venue for an incorrect county affects a substantial right and is immediately appealable. **Hawley v. Hobgood, 606.**

Appealability—dismissal of claims—certification—final judgments on some claims—The trial court's dismissal of five of twenty-three claims was interlocutory but properly before the Court of Appeals because the trial court included a Rule 54(b) certification and the dismissals were final judgments. **Fabrikant v. Currituck Cty., 30.**

Appealability—mootness—child reached age of majority—Although defendant contends the trial court erred in a child support case by ruling that plaintiff's action of refusing to return their oldest child to defendant on 17 August 2003 as scheduled did not constitute willful contempt, this assignment of error is dismissed as moot because the child has since turned eighteen and is thus no longer a minor. **Swanson v. Herschel, 803.**

Appealability—motion to disqualify counsel—An order granting a motion to disqualify counsel is immediately appealable. **Ferguson v. DDP Pharm., Inc., 532.**

Cross-assignment of error—cross appeal—Although plaintiff has cross-assigned error that there was insufficient evidence to support the trial court's reduction in plaintiff's damages in a trespass case, this cross-assignment of error is dismissed because it is not an alternative basis in law for supporting the judgment, but instead constitutes an attack on the judgment itself. The correct method for plaintiff to have raised this question on appeal was to have raised the issue on cross appeal. **CDC Pineville, LLC v. UDRT of N.C., LLC, 644.**

Cross-assignment of error—unnecessary to reach issue—Although plaintiff has cross-assigned error to the trial court's findings of fact in a trespass case that the pipe was owned by plaintiff and that the pipe originally was installed on plaintiff's property prior to the severance of title, it is unnecessary to reach this cross-assignment of error because the Court of Appeals already affirmed the trial court's finding that plaintiff established a prima facie case of defendant's trespass and that defendant failed to establish any affirmative defense. **CDC Pineville, LLC v. UDRT of N.C., LLC, 644.**

Failure to raise double jeopardy at trial—precluded on appeal—Defendant's failure to raise double jeopardy as the basis of a motion to dismiss at trial precludes consideration of the assignment of error on appeal. **State v. Mason, 206.**

Invited error—drafting instructions—Defendant cannot complain on appeal about language in attempted voluntary manslaughter instructions where he helped draft the instructions and communicated to the trial court that he was satisfied. **State v. Yang, 755.**

Invited error—drafting instruction—no prejudice—no plain error review—An instruction on self-defense was not reviewable as plain error where defendant helped create the instruction. Defendant invited any error and cannot now assert prejudice. **State v. Yang, 755.**

Invited error—no supporting authority—Plaintiffs were not entitled to the “stipulated dismissal” of an amended takings claim rather than a dismissal on the

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merits where they gave the court the option of outright dismissal. Further, they cited no authority in support of their argument. **Fabrikant v. Currituck Cty.**, 30.

Law of the case—prior appeal—issues not necessary or decided—Defendant's failure to cross-appeal issues in a first appeal did not preclude him from raising them in the second appeal because they were not actually decided on the first appeal, nor were they necessary for that decision. **Taylor v. Abernethy**, 93.

Preservation of issues—appellate rules violations—Defendant's appeal from a judgment ordering specific performance of a separation agreement and of an amendment to the agreement is dismissed because defendant failed to properly preserve for appellate review the issues presented on appeal when he violated several rules of appellate procedure. **Walker v. Walker**, 778.

Preservation of issues—denial of motion in limine—no objection at trial—An appeal was heard from the denial of a pretrial motion to suppress, even without an objection at trial, to prevent a manifest injustice to a defendant who may have relied on a statute presumed to be constitutional at the time of trial. **State v. Oglesby**, 658.

Preservation of issues—denied discovery—The Court of Appeals will not order a new trial on conjecture and speculation. The plaintiffs in this case did not demonstrate prejudice from the denied discovery of medical peer review material where they neither attempted to introduce evidence about the peer review process at trial nor requested an in camera review of the documents. **Miller v. Forsyth Mem'l Hosp., Inc.**, 619.

Preservation of issues—failure to argue—Assignments of error that were not presented in defendants' briefs are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). **State v. Jacobs**, 1.

Preservation of issues—failure to argue—All original assignments of error not argued in either respondent's brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). **In re B.D.**, 234.

Preservation of issues—failure to argue—Assignments of error that defendant did not argue on appeal are deemed abandoned under N.C. R. App. P. 28(a). **State v. Edwards**, 490.

Preservation of issues—failure to argue—Although defendant contends the trial court committed plain error in a multiple breaking and entering, multiple larceny, and safecracking case by failing to consider mitigating factors during sentencing, defendant waived appellate review of this issue because defendant failed to make any argument in his brief regarding the prejudicial impact of the alleged plain error. Further, *Blakely v. Washington*, 542 U.S. 296 (2004), does not apply to this case since defendant was sentenced within the presumptive range. **State v. Cummings**, 772.

Preservation of issues—failure to assign error—Although defendants contend the Industrial Commission erred in a workers' compensation case by failing to give defendants a credit for temporary total disability benefits paid past the date defendant reached maximum medical improvement, this argument is dis-

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missed because: (1) defendants failed to assign error to the Commission's opinion and award on the basis that a credit was erroneously overlooked by the Commission as required by N.C. R. App. P. 10(a); and (2) none of the assignments of error direct the attention of the Court of Appeals to an alleged error regarding the credit, nor are there clear or specific record or transcript references included in the brief as required by N.C. R. App. P. 10(c)(1). **Lewis v. Craven Reg'l Med. Ctr.**, 561.

Preservation of issues—failure to assign error—life sentence for minor—Defendant did not assign error and did not preserve for appeal the question of whether a life sentence without parole for a 16-year old violated the Eighth and Fourteenth Amendments. **State v. Medina**, 723.

Preservation of issues—failure to assign error—references to defendant having been in jail—Failure to assign error to a ruling by the trial court meant failure to preserve for appeal issues concerning references to defendant having been in jail. **State v. Medina**, 723.

Preservation of issues—failure to object—failure to cite authority—Although defendant contends the sentence imposed by the trial court in a multiple breaking and entering, multiple larceny, and safecracking case violated sentencing policies established by the legislature and violated defendant's due process rights, this assignment of error is overruled because: (1) defendant failed to object at trial and thus failed to properly preserve this issue for appellate review; and (2) defendant failed to cite any authority in his appellate brief to support this argument. **State v. Cummings**, 772.

Preservation of issues—failure to raise in trial court—Defendant church's argument that it was not properly served with a summary judgment motion was not preserved for appeal where the issue of proper notice was not raised in the trial court. **Dixon v. Hill**, 252.

Preservation of issues—neglected child—guardianship and visitation—Issues concerning guardianship and visitation for a neglected child were preserved for appeal despite respondent's failure to object at the dispositional hearing. **In re E.C.**, 517.

Preservation of issues—substitution order—notice of appeal—failure to object—The appellate court had no jurisdiction to review defendants' contentions regarding an order substituting the administrator of a deceased party's estate as a party defendant because defendants did not specifically reference the order of substitution in the notice of appeal from a summary judgment order and the record contains no indication that defendants objected to the order of substitution. **Dixon v. Hill**, 252.

Record—evidence at hearing not presented—assignments of error dismissed—Plaintiffs' assignments of error arising from an arbitration were dismissed where the record did not reflect the evidence presented to the arbitration panel, in violation of Rule 9(a)(1)e of the Rules of Appellate Procedure. The memorandum of an advocate cannot be a proper substitute for establishing the evidence received during an arbitration proceeding. **Global Circuits of N.C., Inc. v. Chandak**, 797.

ARBITRATION AND MEDIATION

Award—not ambiguous—An arbitration award was not ambiguous and inconsistent where it fully addressed the issues presented by the parties and set forth its decision in clear terms. **Global Circuits of N.C., Inc. v. Chandak, 797.**

Reasoning of award—not required—There was no remand of an arbitration award which did not include the reasoning for the arbitration panel's decision; the arbitration agreement did not require the arbitrators to set forth their reasoning, nothing in the record suggests that defendants assented to plaintiffs' request for a statement of reasoning, and there is no persuasive authority that suggests that the panel was required to provide its reasoning on these facts. **Global Circuits of N.C., Inc. v. Chandak, 797.**

ASSAULT

Deadly weapon inflicting serious injury—failure to instruct on lesser-included offenses—The trial court erred by failing to instruct the jury in on the lesser-included offenses of assault with a deadly weapon and assault inflicting serious injury for the charge of assault with a deadly weapon inflicting serious injury, because: (1) the jurors were not instructed that defendant's hands were deadly weapons per se, but rather they were asked to determine whether defendant's hands became deadly weapons as used in the alleged assault; and (2) the jury could find that the victim did not suffer serious injury. **State v. McCoy, 105.**

Deadly weapon inflicting serious injury—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury, because the State's evidence, including documents from the domestic violence hearing that were admitted as substantive evidence, tended to show that defendant stabbed the victim five times with a knife causing wounds still visible some eight weeks after the assault, which adequately supported an inference that defendant assaulted the victim with a deadly weapon. **State v. McCoy, 105.**

Instruction—deadly weapon as a matter of law—knife—The trial court did not err or commit plain error by instructing the jury that a knife is a deadly weapon as a matter of law for the charge of assault with a deadly weapon inflicting serious injury given the evidence of the knife's use and the injuries produced. **State v. McCoy, 105.**

ATTORNEYS

Disqualification as counsel—discretion of judge—The decision to disqualify counsel is discretionary with the trial judge and is not generally reviewable, absent abuse of discretion. **Ferguson v. DDP Pharm., Inc., 532.**

Disqualification of firm—conflict of interest—The trial court did not abuse its discretion by disqualifying counsel under the North Carolina Rules of Professional Conduct where one partner in a firm represented plaintiff in a criminal matter involving forged prescriptions, and another partner in the same firm attempted to represent defendant in a civil action by plaintiff alleging malicious prosecution and other claims. **Ferguson v. DDP Pharm., Inc., 532.**

BANKS AND BANKING

Mortgage loan officer licensure—complaints—reliance on number, not validity—The Banking Commission did not err when denying licenses for mortgage loan officers in its findings about the number of consumer complaints against a company owned by appellants. Testimony from the ombudsman in the Office of the Commissioner of Banks was from personal knowledge as to the number and not the validity of the complaints, and the Commission's findings were only to that effect. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—default judgment for unfair and deceptive practices—not conclusive—The Banking Commission did not treat as conclusive a default judgment for unfair and deceptive practices against a mortgage company owned by the applicants for mortgage loan officer licensure. The Commission's findings indicate that the default judgment was treated as evidence of a claim which, coupled with other testimony, demonstrated a pattern of business operations. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—denial not arbitrary—The Banking Commission's decision to deny mortgage loan officer licensure was not arbitrary or capricious where the Commission made detailed findings and conclusions which rationally support the denial of appellants' applications. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—failure to make certain findings—The Banking Commission did not err by failing to make findings appellants contended could have been made in a case concerning mortgage loan officer licensure. The Commission properly considered the evidence in the whole record in making its findings. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—findings—sufficiency of evidence—Evidence in the whole record supported the Banking Commission's findings in denying mortgage loan officer licensure. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—general counsel as prosecutor—due process—Appellants alleged no bias or prejudice from the participation of the general counsel of the Office of Commissioner of Banks as the prosecutor in the proceeding in which they were denied mortgage loan officer licensure. As they allege no actual harm, no per se violation of due process may be found. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—grandfather provisions—The Banking Commission did not err by refusing appellants' loan officer license applications under the grandfather provisions of the Mortgage Lending Act. A plain language reading of the statute indicates that the grandfather clause exempts practicing loan officers from the required training only, not from additional statutory requirements. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—purpose—plain language of Act—The Banking Commission relied on the plain language of the Mortgage Lending Act in determining its purpose, and did not rely on opinion testimony. **State ex rel. Banking Comm'n v. Weiss, 78.**

Mortgage loan officer licensure—responsibility for subordinate employee—There was no merit to the assertion that the Banking Commission erred by

BANKS AND BANKING—Continued

making applicants for licensure as mortgage loan officers responsible for the conduct of a subordinate employee. The Banking Commission's conclusions rely on findings supported by the record as to appellants' own actions and responses to consumer complaints. **State ex rel. Banking Comm'n v. Weiss, 78.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the charge of breaking or entering, because: (1) defendant testified that he went into a company's building through the front door that had previously been closed after a companion entered the building through a skylight and let him in, thus meeting the entering a building element; and (2) the evidence viewed in the light most favorable to the State showed that defendant committed the offense with the intention to steal property from the company. **State v. Garcia, 498.**

CHILD ABUSE AND NEGLECT

Adjudication of neglect—circumstances from other county considered—In adjudicating a child neglected, a district court is not limited to considering only those circumstances occurring within its district; otherwise, abusive and neglectful parents could avoid court intervention by simply moving from county to county. Sufficient evidence was presented here to support the conclusion of neglect. **In re E.C., 517.**

Appointment of guardian—findings—The trial court was not required to make findings pursuant to N.C.G.S. § 7B-507(b) when appointing a guardian for a neglected child where the guardianship was not the permanent plan and did not end DSS's duty to continue reunification efforts with the parent. **In re E.C., 517.**

Appointment of guardian—timing—A guardian may be appointed by the trial court at any time during juvenile proceedings, including the dispositional hearing, when it finds such appointment to be in the juvenile's best interest, as here. **In re E.C., 517.**

Child welfare reviews—procedure—not frozen at first petition—N.C.G.S. § 7B-600(b), and the relevant amended portion of 7B-906(b), apply to child welfare reviews commenced after 1 October 2000, including this action. Even though the current version of the statutory scheme was not the law when the child was placed under the care of guardians, the operative effect of these two statutes is procedural and does not alter the legal consequences of conduct completed prior to their enactment. Freezing the governing procedure in child welfare cases when the first petition is filed would create an unworkable system, given the longevity and fluidity of custody proceedings. **In re J.D.C., 157.**

Guardianship—action by parent to regain custody—standard for hearing—The trial court applied an incorrect standard to a parent's hearing to regain custody of her child, who had been placed in the guardianship of grandparents. The court applied N.C.G.S. § 7B-600(b), which placed the burden on the parent to show that the guardianship should be terminated, but the court had never held a permanency planning hearing for the guardianship pursuant to N.C.G.S. § 7B-907. **In re J.D.C., 157.**

CHILD ABUSE AND NEGLECT—Continued

Guardianship—visitation—Awarding visitation for a neglected child is a judicial function which may not be delegated to the custodian of the child, although the trial court may grant some good faith discretion to suspend visitation, subject to notice and review by the court. The trial court here erred by failing to include an appropriate visitation plan in its dispositional order for the neglected child. **In re E.C.**, 517.

Removal from custody—one of three grounds required—findings insufficient for dependency—In order to remove a juvenile from the parents' custody the trial court must determine that the juvenile is abused, neglected, or dependent, and a finding of any of the three grounds will support the court's decision. Although this respondent appealed on somewhat different grounds, and there was sufficient evidence of neglect, the trial court erred by concluding that a child was dependent without findings of fact concerning respondent's ability to provide care, supervision or an alternative arrangement for care. **In re E.C.**, 517.

CHILD SUPPORT, CUSTODY, AND VISITATION

Arrearage—calculation—The trial court's calculation of child support arrearages is vacated and remanded for more specific findings regarding the amount due for the periods in question. **Swanson v. Herschel**, 803.

Arrearage—sufficiency of notice—The trial court did not err by concluding that the matter of child support arrearage was properly before the trial court even though defendant contends he did not receive sufficient notice, because: (1) plaintiff's motion regarding custody and child support on 19 August 2003 apprised defendant that the hearing would include child support issues including arrearage; and (2) even though defendant contends that it was unclear which motion was being brought for hearing when plaintiff's notice of hearing only referred to the motion as the August 2003 motion instead of referring to a specific date, plaintiff only made one motion in August. **Swanson v. Herschel**, 803.

Attorney fees—reimbursement—The trial court did not abuse its discretion in a child support case by ordering plaintiff mother to reimburse defendant father for half of his attorney fees. **Roberts v. McAllister**, 369.

Custody—modification—The trial court did not err in a child custody case by modifying its previous custody order and awarding plaintiff mother primary custody. **Karger v. Wood**, 703.

Custody—substantial change in circumstances—The trial court did not err by denying defendant's motion for involuntary dismissal in a child custody case even though he contends the evidence failed to establish a substantial change of circumstances affecting the welfare of the minor child, because plaintiff presented sufficient evidence to withstand defendant's N.C.G.S. § 1A-1, Rule 41(b) motion. **Karger v. Wood**, 703.

Custody—substantial change in circumstances—affect on child's welfare—The trial court did err in its order changing child custody by failing to include a specific conclusion that the change of circumstances "affected the welfare of the child" because the court's conclusion that changed circumstances occurred "such as justifies modification of the previous orders as set forth hereinafter and said modification would be in the best interests of the minor child" is

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

an implicit conclusion that the change in circumstances affected the welfare of the child. **Karger v. Wood, 703.**

Deviation from Child Support Guidelines—failure to make findings—The trial court erred by deviating from the presumptive child support guideline amount and setting \$56 per month for ongoing child support payments, because, (1) the trial court failed to make any finding regarding the reasonable needs of the child for support; and (2) this failure mandates a remand for further findings of fact. **State ex rel. Gillikin v. McGuire, 347.**

Deviation from child support guidelines—imputing minimum income—The trial court did not abuse its discretion by deviating from the North Carolina Child Support Guidelines based on the reasonable needs of the children and by imputing minimum income to plaintiff mother who is voluntarily unemployed. **Roberts v. McAllister, 369.**

Prospective child support—findings of fact and conclusions of law required—The trial court erred when it failed to order prospective child support from January 2002 (the month after the complaint was filed) through March 2004 (the month the court's order was entered), and the case is remanded to the lower court for further findings of fact and conclusions of law consistent with this opinion, because: (1) the court must make findings regarding the reasonable needs of the child for an award of prospective child support; and (2) if the trial court decides not to order prospective child support, it must show that it properly deviated from the Guidelines and include appropriate findings of fact to justify the deviation. **State ex rel. Gillikin v. McGuire, 347.**

Reimbursement for past paid public assistance—trial court's ability to consider equitable factors—The trial court did not err in a child support case by failing to order defendant to reimburse the State of North Carolina for past paid public assistance given to the minor child in light of the trial court's ability to consider equitable factors in determining whether to order reimbursement where the trial court found that at the time plaintiff mother was receiving this assistance, other persons had been named as potential fathers of the minor child, and plaintiff mother waited over fifteen years before instituting this action against defendant. **State ex rel. Gillikin v. McGuire, 347.**

Rule 60(b)(6)—motion to amend effect of order—motion for relief from order—The trial court erred by granting a motion to amend the parties' child custody order pursuant to N.C. G.S. § 1A-1, Rule 60(b)(6), and the original custody order of remains in effect, because: (1) Rule 60(b)(6) allows a trial court to grant relief from a judgment or order for any other reason justifying relief from the operation of the judgment; (2) rather than seeking to be relieved of the effect of the custody order, plaintiff sought to amend the effect of that order to reduce defendant's weeknight visitation privilege; and (3) the trial court amended the decretal portion of the custody order, rather than relieving the plaintiff of its provisions. **Black v. Black, 361.**

Support—amount—failure to make sufficient findings of fact—The trial court erred by entering an order requiring plaintiff mother to pay child support for the parties' three children in the amount of \$800 per month and by awarding defendant husband \$800 per month in child support for the thirteen months between the date of entry of the child custody order and the date of the support

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

hearing, because the findings were insufficient to indicate the basis for the award of support in the amount of \$800 as required by N.C.G.S. § 50-13.4. **Roberts v. McAllister**, 369.

Support—foreign order—full faith and credit—The trial court did not err by finding that the 1991 Tennessee child support order was controlling in this case instead of a 1989 Washington state child support order, that defendant had paid all child support due under the Tennessee order, and that defendant owed no outstanding arrearages. **Uhrig v. Madaras**, 357.

Uninsured medical expenses—failure to show abuse of discretion—The trial court did not err by requiring plaintiff mother to pay one-half of the uninsured medical expenses for the minor children. **Roberts v. McAllister**, 369.

CIVIL PROCEDURE

Attorney fees—earlier offer—partial—A partial offer to distribute the marital residence was not sufficient to create a binding final judgment on all pending issues in an equitable distribution action, and N.C.G.S. § 1A-1, Rule 68 pertaining to costs and attorney fees when an offer of judgment is unaccepted did not apply. **Lauterbach v. Weiner**, 201.

Findings made during preliminary injunction—not binding at trial—The findings of fact made during a preliminary injunction proceeding are not binding at a trial on the merits, and the trial court here did not err by determining that there was no genuine issue of material fact and awarding summary judgment for defendant. **Lohrmann v. Iredell Mem'l Hosp., Inc.**, 63.

Rule 60—not a substitute for appellate review—The trial court did not abuse its discretion by dismissing a Rule 60 motion to vacate a termination of parental rights after an unsuccessful appeal. **In re L.C. & A.N.**, 622.

Rule 60(b)(6)—motion to amend effect of order—motion for relief from order—The trial court erred by granting a motion to amend the parties' child custody order pursuant to N.C. G.S. § 1A-1, Rule 60(b)(6), and the original custody order remains in effect, because: (1) Rule 60(b)(6) allows a trial court to grant relief from a judgment or order for any other reason justifying relief from the operation of the judgment; (2) rather than seeking to be relieved of the effect of the custody order, plaintiff sought to amend the effect of that order to reduce defendant's weeknight visitation privilege; and (3) the trial court amended the decretal portion of the custody order, rather than relieving the plaintiff of its provisions. **Black v. Black**, 361.

Substitution of administrator—notice of summary judgment motion—The trial court erred by granting summary judgment in favor of plaintiffs as to the administrator of a deceased defendant's estate who was substituted as a party for the deceased defendant because he did not receive proper notice of the motion for summary judgment where the order of substitution making the administrator a party to this action was entered on the same day that the court entered the summary judgment order. **Dixon v. Hill**, 252.

Summary judgment—substitution order on same day—additional name for church—notice—Defendant church was not deprived of proper notice of a summary judgment motion because the trial court granted a motion for substitu-

CIVIL PROCEDURE—Continued

tion on the same day as the hearing on the summary judgment motion where, with respect to the church, the substitution order only added an additional name by which the church was known; the church was already a party to the action; and the church was not prejudiced by the entry of substitution and summary judgment orders on the same day. **Dixon v. Hill, 252.**

Summary judgment—supporting affidavit—personal knowledge—Plaintiff wife's affidavit was not based upon mere information and belief and was competent evidence to support the entry of summary judgment against defendant church in an action for breach of contract, fraud, negligent misrepresentation, conversation, unfair trade practices, unjust enrichment and punitive damages arising from the purchase of a home by the church's bishop using plaintiffs' settlement funds where the affidavit stated that the wife "has personal knowledge of the matters stated herein, except where stated upon information and belief," but the facts stated in the affidavit were all based upon the wife's personal knowledge. **Dixon v. Hill, 252.**

Summary judgment—unverified answer—unverified discovery responses—Plaintiffs' motion for summary judgment could not be defeated by defendant church's denials of plaintiffs' allegations in its unverified answer or by defendant's unverified responses to plaintiffs' request for admissions. **Dixon v. Hill, 252.**

CIVIL RIGHTS

§ 1983—exhaustion of administrative remedies—*Procedural* due process claims may not be brought under 42 U.S.C. § 1983 until administrative remedies have been exhausted. Although violation of a *substantive* right may be the subject of a § 1983 claim regardless of the exhaustion of remedies, plaintiffs here did not sufficiently state such a claim. **Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 266.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Custodial statement—motion to suppress—The trial court did not err in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by denying defendant's motion to suppress his custodial statement, because: (1) the trial court was not required to make written findings of fact when there was no material conflict in the evidence of this case; (2) the waiver form signed by defendant on 6 August 2002 indicated that he was willing to make a statement and answer questions and that he did not want a lawyer at that time; (3) defendant failed to introduce any evidence during the suppression hearing tending to show he invoked his right to counsel on 6 August 2002, and if anything, he invoked his right to remain silent regarding an unrelated incident; and (4) law enforcement officials involved in the investigation of the pertinent incident honored defendant's invocation of his right to remain silent regarding an unrelated incident. **State v. Jacobs, 1.**

CONSTITUTIONAL LAW

Administrative rule review sought—constitutional challenge not raised—The trial court correctly refused to rule on plaintiff Board of Pharmacy's con-

CONSTITUTIONAL LAW—Continued

stitutional challenge to the authority of the Rules Review Commission (RRC) where plaintiff sought RRC approval but did not raise a constitutional challenge until after it received an unfavorable outcome. **N.C. Bd. of Pharmacy v. Rules Review Comm'n**, 301.

Cruel and Unusual Punishment—life sentence for minor—no violation—The U.S. Supreme Court ruling forbidding the death penalty for those under 18, *Roper v. Simmons*, 161 L. Ed. 2d 1 (2005), did not consider life imprisonment. **State v. Medina**, 723.

Double jeopardy—assault—The trial court violated defendant's right to be free of double jeopardy when it sentenced him in 03 CRS 79519 for both assault with a deadly weapon inflicting serious injury and assault inflicting serious injury, and in 03 CRS 71958 for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury because, although the evidence establishes assaults on two different days, it does not establish that two separate and distinct assaults occurred on each of the dates in question as opposed to multiple injuries arising from a single continuous transaction. **State v. McCoy**, 105.

Double jeopardy—convictions for assault with a deadly weapon and attempted voluntary manslaughter—Double jeopardy was violated by convictions for assault with a deadly weapon inflicting serious injury with intent to kill and attempted voluntary manslaughter. Where a felonious assault offense includes intent to kill as an element, attempted voluntary manslaughter is a lesser included offense of the assault. **State v. Yang**, 755.

Double jeopardy—felony murder and underlying felony—The trial court violated double jeopardy by sentencing defendant for both first-degree kidnapping and attempted armed robbery where the jury had been instructed that both could be the underlying felony for felony murder. While there is an argument that judgment could be entered on neither underlying felony, prior Court of Appeal decisions require arrest of judgment on one of those felonies. **State v. Oglesby**, 658.

Double jeopardy—malicious conduct by prisoner—misdemeanor assault of government employee—The trial court did not violate defendant's right against double jeopardy by entering judgment for both malicious conduct by a prisoner and habitual misdemeanor assault even though identical conduct was alleged malicious conduct by a prisoner requires only that a bodily fluid or excrement be thrown at a government official whereas misdemeanor assault on a governmental official requires that the official either be touched by the instrument of assault or reasonably fear such a touching and the legislature intended to punish two different types of behavior even though defendant's conduct was the same for both offenses. **State v. Artis**, 668.

Due process—consistency of theories—kidnapping—sex offender registration—The trial court did not violate defendant's due process rights in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by allegedly presenting inconsistent theories at trial when it argued throughout trial that defendant was the child's father but then at sentencing told the court that there was no evidence presented that defendant was in fact the father when it requested that defendant be required to register as a sex offender based on the fact that he kidnapped the child. However, when the

CONSTITUTIONAL LAW—Continued

case is remanded for resentencing based upon another violation in this case, the trial court should revisit the recommendation regarding registration because there is no basis for requiring defendant to register as a sex offender when the only evidence in the record indicates that defendant is the father of the kidnapped child. **State v. Pittman, 745.**

Effective assistance of counsel—failure to move for motion to suppress inculpatory statement and evidence—Defendant did not receive ineffective assistance of counsel in a possession of a controlled substance on the premises of a local confinement facility case based on his counsel's failure to move to suppress his inculpatory statement to law enforcement officers as well as the evidence seized during the search of his person, because there was no meritorious basis to support suppression of defendant's statements or the marijuana found on his person. **State v. Dent, 459.**

Effective assistance of counsel—failure to object—failure to show prejudice—Defendant did not receive ineffective assistance of counsel in a multiple breaking and entering, multiple larceny, and safecracking case based on his counsel's failure to object to defendant's sentence as a violation of the Eighth Amendment and on grounds of legislative policy considerations, because assuming arguendo that defense counsel's performance may have been deficient based on his failure to object during defendant's sentencing hearing, defendant failed to show how he was prejudiced when his counsel negotiated a plea arrangement wherein defendant's additional twenty-one felony offenses were consolidated for judgment with the original ten felony offenses such that defendant received no additional time for the twenty-one felonies. **State v. Cummings, 772.**

Effective assistance of counsel—failure to object to record level—Defendant did not demonstrate ineffective assistance of counsel where his trial counsel did not object to his assigned prior record level, but defendant did not show that not objecting was unreasonable or that there was any probability of a different result without the alleged error. **State v. Hall, 353.**

Effective assistance of counsel—failure to show deficiency—Defendant did not receive ineffective assistance of counsel in an assault and kidnapping case by allegedly requesting the court to impose consecutive sentences on defendant, because: (1) the record indicates that defense counsel did not, in fact, request consecutive sentences; and (2) defendant failed to demonstrate how his counsel's performance was deficient. **State v. McCoy, 105.**

Effective assistance of counsel—retrial on procedural error—failure to raise double jeopardy at trial—no error—A claim for ineffective assistance of counsel based on trial counsel's failure to argue that defendant's retrial was double jeopardy lacked merit because defendant could not show a reasonable probability that the indictment would have been dismissed had the motion been argued. Defendant may not be retried if the reversal was based upon the sufficiency of the evidence; here, the defect was procedural. **State v. Mason, 206.**

Effective assistance of counsel—tactical decisions—no error—Defendant's Sixth Amendment guarantee of the effective assistance of counsel was not violated by his counsel's decisions about testimony and an objection. Defense counsel apparently made a tactical decision; even so, any error was not so seri-

CONSTITUTIONAL LAW—Continued

ous that his attorney was not functioning as counsel guaranteed by the amendment. **State v. Medina**, 723.

Equal protection—restricting defense counsel's contact with treating physician—There was no equal protection violation in a workers' compensation case in barring particular ex parte communications between defense counsel and treating physicians. Defense counsel and plaintiff's counsel are not similarly situated due to differing confidentiality obligations. **Mayfield v. Hannifin**, 386.

Petitioning for redress—lobbying—immunity—The Noerr doctrine applies in North Carolina to bar any claim that has its gravamen in constitutionally protected petitioning activity. The trial court here did not err by dismissing claims by one hospital against another arising from the denial of a certificate of need; the exceptions for false information depriving the proceeding of legitimacy and sham or objectively baseless lobbying activities did not apply. **Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.**, 266.

Right of confrontation—detective's testimony about witness—evidence otherwise admitted—no error—The trial court did not violate the Sixth Amendment right to confrontation in a first-degree murder prosecution by admitting a detective's testimony that he considered defendant's cousin Jorge (who did not testify) a material witness against defendant based on an interview with Jorge. The jury had already heard that Jorge had been with defendant before and immediately after the murder and had implicated defendant as the murderer. The State was not trying to do indirectly what it could not do directly. **State v. Medina**, 723.

Right of confrontation—testimonial evidence—codefendant's written confession—harmless error—Although defendant's right of confrontation was violated in a felonious breaking and entering case by the admission of a coparticipant's written statement into evidence when it was testimonial evidence and defendant did not have a prior opportunity to cross examine the coparticipant at any point before the statement was introduced into evidence, the error was harmless beyond a reasonable doubt because there was sufficient evidence of the intent element of the crime of felonious breaking and entering without the coparticipant's statement. **State v. Garcia**, 498.

Right to counsel—motion to withdraw waiver of counsel—The trial court did not err in a first-degree statutory rape case by denying defendant's motion to withdraw his waiver of counsel, because defendant failed to clearly state a request to withdraw his waiver of counsel and failed to provide a reason for the delay in requesting the withdrawal constituting good cause. **State v. Hoover**, 596.

Right to counsel—waiver of counsel—pro se representation—The trial court did not err in a first-degree statutory rape case by permitting defendant to waive his right to counsel and allowing him to proceed pro se, because: (1) the trial court fully complied with N.C.G.S. § 15A-1242 before allowing defendant to waive his right to counsel; and (2) the court's findings of fact support its decision to permit defendant to waive his right to counsel and proceed pro se. **State v. Hoover**, 596.

CONSTITUTIONAL LAW—Continued

Right to remain silent—Miranda protections not applicable when questioned by neither an officer nor someone acting as an agent—The trial court did not commit plain error in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by allowing the child's mother to testify regarding defendant's failure to respond to questions she asked him in letters concerning why he kidnapped their daughter, because Miranda's protections apply only when a defendant is subject to custodial interrogation; the mother's questions were posed by her and the record contains no indication that she was acting at the behest of law enforcement; and even if Miranda were applicable, defendant chose not to remain silent when he voluntarily wrote back to the mother. **State v. Pittman, 745.**

Right to unanimous verdict—multiple indecent liberties offenses—Defendant's right to a unanimous verdict was denied with respect to convictions on four counts of indecent liberties, even though defendant was charged with only four counts of indecent liberties, where the State presented evidence of more than four incidents of indecent liberties; although the trial court instructed the jury to consider each count a separate and distinct act, the instructions made no further attempt to distinguish among the counts; and it is therefore impossible to determine whether each juror had in mind the same four incidents when voting to convict defendant. **State v. Massey, 216.**

Right to unanimous verdict—multiple sexual offenses in parental role—Defendant's right to a unanimous verdict was not violated with respect to convictions on two of the ten counts of sexual offense by a person in a parental role where there was sufficient evidence to support convictions for acts occurring in two different locations, and the trial court's disjunctive instruction allowed different sexual acts to be considered as alternate means by which the State proved a single offense. However, defendant's right to a unanimous verdict was denied with respect to convictions on eight counts of sexual offense by a person in a parental role where it is impossible to relate the charges in the verdict sheets to specific instances because the verdict sheets did not associate an offense with a given incident. **State v. Massey, 216.**

Right to unanimous verdict—multiple sexual offenses with child—Defendant's right to a unanimous verdict was not violated with respect to convictions on five counts of first-degree sexual offense with a child under thirteen where the instructions and verdict sheets contained specific references to the date, act and location of each of the alleged acts, and it was possible from those references to determine which of defendant's five convictions correspond to the acts testified to at trial. **State v. Massey, 216.**

Taking of dry sand beach—underlying claims dismissed—Claims for an unconstitutional taking regarding the "dry sand area" of a beach were not addressed where the underlying claims to quiet title and declaratory relief were properly dismissed. **Fabrikant v. Currituck Cty., 30.**

CONSTRUCTION CLAIMS

Prime contractors—services rendered for State of North Carolina—notice of damage—A de novo review revealed that the trial court did not err by denying third-party plaintiff a judgment for recovery under N.C.G.S. § 143-128 for

CONSTRUCTION CLAIMS—Continued

its painting services rendered to a State of North Carolina construction project based on its determination that Article 15(e) of each party's contract with the State required notice of damage to the prime contractor allegedly responsible prior to repair of the damage and that plaintiff did not provide notice to defendant until several months after the damages occurred and almost two months after the repairs were completed. **D.W.H. Painting Co. v. D.W. Ward Constr. Co.**, 327.

CONTRACTS

Construction of driveway—consent judgment—specifications—not dependent covenants—So long as defendant's ability to use a driveway built to benefit both parties is not adversely affected, specifications regarding the location of a driveway and the types of rock comprising the driveway cannot be construed as dependent covenants (which are indispensable to the parties' intent). The trial court did not err by allowing recovery from defendant for the cost of the driveway despite deviations from the consent order which required its construction. **Reaves v. Hayes**, 341.

Loans—charging higher interest rate—cancellation—The trial court did not err by decreeing that Advance Internet rebate contracts with North Carolina consumers were cancelled pursuant to N.C.G.S. § 75-15.11 and by requiring all funds collected by defendants pursuant to such contracts be refunded to consumers, because: (1) the trial court's order is authorized by N.C.G.S. § 53-166(d) and N.C.G.S. § 24-2; (2) having already concluded that the trial court did not err by granting summary judgment for plaintiffs, this issue has necessarily been resolved against defendants; and (3) although defendants contend the court was required to apportion defendants' refund of funds collected by defendants pursuant to the contracts, defendants failed to offer any argument or authority to support this position as required by N.C. R. App. P. 28(b)(6). **State ex rel. Cooper v. NCCS Loans, Inc.**, 630.

To make a will—elements—execution—The trial court erred by refusing defendant's request for an instruction on whether plaintiff had established the elements of a contract in an action on a contract to make a will. When the opposing party presents evidence rebutting the presumption of due execution arising from recordation and notarization, there is a permissive inference for the jury to determine. The trial court invaded the province of the jury and acted as the fact finder when it concluded that the document was a valid contract to make a will. **Taylor v. Abernethy**, 93.

CORPORATIONS

Pro se appearance by corporation in small claims court—general appearance—right to challenge improper service waived—The owner and operator of an incorporated automotive repair business could represent the business pro se in small claims court, but his participation constituted a general appearance which waived his right to challenge his acceptance of service (he was not an officer, director, or managing agent of the corporation). The district court erred by overturning the magistrate's judgment for improper service. **Woods v. Billy's Auto.**, 808.

COSTS

Attorney fees—appeal—Although the trial court did not abuse its discretion by failing to award more than \$55,000 in attorney fees for the trial of a fraud and unfair and deceptive trade practices case, the case is remanded for a determination of the hours spent on appeal, for a reasonable hourly rate, and for the entry of an appropriate attorney fee award. Plaintiffs are entitled to attorney fees on appeal since plaintiffs were entitled to attorney fees for hours expended at the trial level. **Willen v. Hewson, 714.**

Attorney fees—findings—no abuse of discretion—The trial court made the requisite findings and did not abuse its discretion when awarding attorney fees pursuant to N.C.G.S. § 20-348(a)(2) and N.C.G.S. § 75-16.1. **Blankenship v. Town & Country Ford, Inc., 764.**

Attorney fees—no showing of abuse of discretion—Although defendant contends the trial court abused its discretion in awarding attorney fees in a fraud and unfair and deceptive trade practices case, this assignment of error is overruled because there is no evidence of an abuse of discretion by the trial court and the trial court made all of the necessary findings to support its award of attorney fees. **Willen v. Hewson, 714.**

CRIMINAL LAW

Competency to stand trial—waiver of right to competency hearing—The trial court did not err in a first-degree statutory rape case by determining that defendant was competent to stand trial, because: (1) the court received a report from a forensic examiner stating that defendant was competent to stand trial, and the court ruled as such; and (2) by his failure to challenge the court's ruling, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002(b). **State v. Hoover, 596.**

Defendant shackled during trial—no abuse of discretion—There was no abuse of discretion in ordering a defendant shackled during trial where the bailiff had expressed concern that defendant would run, the matter was addressed in defendant's presence but without the jury, the shackles were not to be seen by the jury, defendant would not have to walk or stand before the jury in shackles, and, although the jury was not instructed to ignore the shackles, there was no showing that the jurors were aware of or affected by the restraint. **State v. Oglesby, 658.**

Habitual misdemeanor assault—absence of arraignment—stipulation of prior convictions—The trial court did not commit prejudicial error by its failure to arraign defendant on a habitual misdemeanor charge or to ask defendant whether he wanted the issue regarding his prior convictions submitted to the jury where defendant requested at trial that his prior convictions not be shared with the jury, and defense counsel, after consultation with defendant, stipulated to the prior convictions. N.C.G.S. § 15A-928. **State v. Artis, 668.**

Instructions—constructive possession—The trial court did not commit plain error in a possession of a firearm by a convicted felon case by its instruction that the jury that could infer defendant's constructive possession of a handgun based on his control over the area in which it was found which was between his leg and the inner console of the vehicle he was driving. **State v. Inman, 567.**

CRIMINAL LAW—Continued

Instructions—diminished capacity—The trial court did not commit plain error in a felonious breaking and entering case by failing to instruct the jury on diminished capacity, because defendant's two statements regarding his mental condition were insufficient to create a reasonable doubt in the jurors' minds that defendant was unable to form the specific intent necessary to commit the crime of breaking and entering. **State v. Garcia, 498.**

Instructions—officer's duty—alleged improper comment on evidence—The trial court did not improperly comment on the evidence during its instructions on assault with a deadly weapon on a government officer by its statement that "arresting a person for driving while impaired is a duty of a Greensboro police officer" when there was no evidence that defendant was arrested or charged with driving while impaired where the officer was investigating a possible driving while impaired offense at the time of the alleged assault, and the court's instruction related to whether the officer was performing a duty of his office at the time of the assault. **State v. Stokes, 447.**

Judgment out of term—failure to set forth formal order in minutes—sufficiency of statements to extend court session—The trial court did not err in a second-degree sexual offense case by entering its judgment out of term, because there are sufficient statements made by the trial court in the record to comply with N.C. Gen. Stat. § 15-167 and to effectively extend the court session. **State v. Locklear, 547.**

Jury request to review testimony—denial not an abuse of discretion—concern about narrow focus—The trial court reasonably exercised its discretion in an attempted murder and assault prosecution by denying the jury's request to review a deputy's testimony. The court was clearly concerned that the jury might overemphasize the testimony of the deputy and not properly consider the totality of the evidence. **State v. McVay, 335.**

Motion to sever trial—unrelated incident—The trial court did not abuse its discretion in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by failing to grant defendant's motion to sever the trial, because defendant was not identified as a participant in any stage of an unrelated incident, and the trial court twice instructed the jury regarding the limited use of the evidence including that it was limited to the codefendant. **State v. Jacobs, 1.**

Mutually exclusive convictions—assault with a deadly weapon and attempted voluntary manslaughter—In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and attempted murder arising from a stabbing, convictions for assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter were mutually exclusive. Defendant either did or did not have the intent to kill at the time of the stabbing. **State v. Yang, 755.**

Prosecutor's argument—not comment on defendants' failure to testify—The prosecutor did not improperly comment on defendants' failure to testify by his statements during his closing argument that the jury "did hear from the defendants" and that "they made statements" where the prosecutor was referring to statements made by defendants following their arrest. Furthermore, the trial

CRIMINAL LAW—Continued

court did not err by instructing the jury that defendants were under no obligation to testify during trial. **State v. Jacobs, 1.**

Voluntary intoxication—instruction not given—no error—The failure to instruct on voluntary intoxication in an manslaughter and assault prosecution was not plain error where nothing in the record indicated that defendant was without the mental faculties to form the necessary mens rea. **State v. Yang, 755.**

DAMAGES AND REMEDIES

Damaged used car—double recovery—election of remedies required—The trial court erred in an action involving a used car by awarding plaintiffs treble damages under both N.C.G.S. § 20-348(a) and Chapter 75. The applicable statutes do not contain language authorizing multiple recoveries; plaintiffs are required to elect their remedy. **Blankenship v. Town & Country Ford, Inc., 764.**

Damaged used car—use of vehicle—The trial court did not err when calculating damages for a used car sold with an undisclosed collision by refusing to offset the value plaintiffs received from use of the vehicle. The court's decision is supported by *Taylor v. Volvo North America Corp.*, 339 N.C. 238. **Blankenship v. Town & Country Ford, Inc., 764.**

Medical—instructions—presumption of reasonableness—Although the trial court in an automobile accident case did not give plaintiff's requested instruction on the rebuttable presumption of the reasonableness of medical charges, the instructions given were accurate statements of law and were fully supported by the evidence. **Osetek v. Jeremiah, 438.**

Reasonableness—trespass—The trial court did not err in a trespass case by awarding plaintiff \$122,918.80 for damage caused by the break in a water pipe, because plaintiffs presented sufficient evidence to allow the trial court to calculate the damages to a reasonable degree of certainty. **CDC Pineville, LLC v. UDRT of N.C., LLC, 644.**

DECLARATORY JUDGMENTS

Allegations—justiciable controversy—A declaratory judgment seeking an interpretation of the public trust doctrine as applied to dry sand beach areas was properly dismissed because plaintiffs did not allege a justiciable controversy. Plaintiffs alleged at most a statement by a single State official asserting a standard that he applied generally, but which has not been applied to plaintiffs' property. **Fabrikant v. Currituck Cty., 30.**

Pleadings—actual controversy required—only complaint considered—Jurisdiction to render a declaratory judgment exists only when the complaint demonstrates an actual controversy. The answer and the course of multi-claim litigation are not considered. **Fabrikant v. Currituck Cty., 30.**

DEEDS

Planned community—Act not referenced—It was not necessary in a case involving homeowners association membership and assessments to determine whether a subdivision was a planned community under the Planned Community

DEEDS—Continued

Act. That Act was not referred to or adopted by either the current bylaws of the homeowners association or the amended restrictive covenants. **Armstrong v. Ledges Homeowners Ass'n, 172.**

Restrictive covenants—amendments—Amended restrictive covenants that included automatic membership in the homeowners association and the collection and enforcement of assessments were adopted and enacted by the property owners in conformity with a uniform plan of development and express powers set out in the covenants, and the trial court did not err by refusing injunctive relief. Petitioners accepted their deeds with the knowledge that the restrictive covenants could be amended in the future. **Armstrong v. Ledges Homeowners Ass'n, 172.**

Restrictive covenants—homeowners association bylaws—alteration—The trial court did not err by denying injunctive relief to homeowners who sought to have amended homeowners association bylaws declared void. Alteration of the terms of the declaration by majority vote of the lot owners was intended by the developer and expressly allowed by the declaration of restrictive covenants. **Armstrong v. Ledges Homeowners Ass'n, 172.**

DISCOVERY

Limited by court—no abuse of discretion—After entry of default, the defendant is deemed to have admitted the allegations of the complaint. Here, the trial court did not abuse its discretion by limiting discovery after remand of a default judgment in an action involving a used car with prior damage alleged to be undisclosed. **Blankenship v. Town & Country Ford, Inc., 764.**

Motion for production—laboratory protocols associated with DNA testing—The trial court did not commit prejudicial error in a prosecution for first-degree murder, first-degree rape and other crimes by denying defendant's written motion for production of the laboratory protocols associated with DNA testing that would be presented at trial, because the error was harmless beyond a reasonable doubt when the question of defendant's identity was not at issue during this trial based on defendant's choice of defense. Thus, the State did not need the DNA evidence to link defendant to the crimes. **State v. Edwards, 490.**

Request for admissions—failure to rebut proper service—failure to respond—Defendant church failed to demonstrate that it was not served with plaintiffs' request for an admission that the church's bishop was acting as its agent when performing the acts and omissions at issue where the trial court had allowed the church's attorney to withdraw, plaintiffs were required by N.C.G.S. § 1A-1, Rule 5(b) to serve the church directly, and the church offered no evidence that the address on the certificate of service was incorrect. Therefore, the church was deemed to have admitted that the bishop was acting as its agent where the church failed to timely respond to the request for admissions. **Dixon v. Hill, 252.**

DIVORCE

Equitable distribution—attorney fees—no statutory authority—Statutory authority to tax costs in equitable distribution cases does not exist in North Carolina (with an exception not applicable here). The trial court did not have authority to award attorney fees on the issue of whether an equitable distribution

DIVORCE—Continued

judgment finally obtained was more favorable than plaintiff's earlier offer. **Lauterbach v. Weiner, 201.**

Equitable distribution—valuation of business—insufficient supporting findings—An equitable distribution order was remanded for further findings on the value of defendant's business where the court fixed the disputed separation date and then the fair market value of the business, but did not make findings regarding the evidence used to reach that figure. The court used a figure proffered by plaintiff's expert, but the expert used her own figures, which were not part of the report submitted to plaintiff and the court, and her valuation did not reflect the separation date determined by the court. **Robertson v. Robertson, 784.**

DRUGS

Conspiracy to traffic in more than 400 grams of cocaine—confession—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic in more than 400 grams of cocaine, because: (1) it is no longer necessary that there be independent proof tending to establish the corpus delicti of the crime charge if the accused's confession is supported by independent evidence tending to establish its trustworthiness; (2) defendant's statements that he had purchased a half kilo (500 grams) of cocaine from a Mexican on three occasions provided sufficient evidence; and (3) two items of independent proof establish the trustworthiness of defendant's statement, including that a substantial quantity of cocaine was found in defendant's possession at the time of his arrest and a controlled buy was conducted in which an informant purchased twenty-six grams of cocaine from defendant in his home. **State v. Sims, 829.**

Instructions—local confinement facility—The trial court did not commit plain error in a possession of a controlled substance on the premises of a local confinement facility case by instructing the jury that the Forsyth County Law Enforcement and Detention Center is a local confinement facility, because: (1) the county law enforcement and detention center is a multiple-use building which includes, among other things, a jail, the sheriff's office, and the magistrate's office; (2) officers discovered marijuana on defendant's person not while he was in the magistrate's office, but while he was in a secured area of the center provided for the detention and search of individuals awaiting appearance before the magistrate; (3) the determination of whether this area was on the premises of a local confinement facility involved the interpretation of the bounds of a statute, which is a question of law for the trial court, not a question of fact for the jury; and (4) the trial court made a proper determination regarding the applicability of N.C.G.S. § 90-95(e)(9) to the facts of this case. **State v. Dent, 459.**

Possession of marijuana—premises of local confinement facility—secured search area—The trial court properly denied defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility in violation of N.C.G.S. § 90-95 (e)(9) where the evidence tended to show that defendant possessed marijuana in a secured area of the Forsyth County Law Enforcement and Detention Center provided for the detention and search of individuals awaiting an appearance before the magistrate. **State v. Dent, 459.**

EASEMENTS

Servient tenant's impermissible interference with dominant tenant's use—motion to dismiss—The trial court erred by granting defendants' Rule 12(b)(6) motion to dismiss plaintiffs' complaint seeking relief for damages allegedly done to an easement by defendants' use and plaintiffs' loss of use resulting from such damage, because such relief is available in North Carolina in situations where a servient tenant impermissibly interferes with a dominant tenant's use of an easement. **Falkson v. Clayton Land Corp.**, 616.

EVIDENCE

Chain of custody—testing procedures—stipulation—The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case by allowing into evidence testimony from a city police officer relating to the chain of custody of the cocaine and testing procedures used by the State Bureau of Investigation laboratory, because: (1) defendant previously stipulated to the facts testified to by the officer; and (2) the stipulation is substituted for proof and dispenses with the need for evidence. **State v. Renfro**, 402.

Codefendants' custodial statement—right to confrontation—no powerfully incriminating characteristics—Defendant's right of confrontation was not denied by the trial court's ruling allowing a detective to read the codefendant's custodial statement to the jury, because: (1) the use of the word "we" in the codefendant's redacted statement did not clearly implicate defendant; and (2) the statement did not contain those powerfully incriminating characteristics requiring reversal under the Confrontation Clause. **State v. Jacobs**, 1.

Codefendant's redacted custodial statement—replacing defendant's name with word "someone"—The trial court committed harmless error, if any at all, in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by allowing the State to introduce a redacted version of the codefendant's custodial statement where defendant's name was replaced with the word "someone," because: (1) the State presented overwhelming evidence to establish defendant's guilt notwithstanding the codefendant's statement and (2) defendant's own statement to law enforcement officers described his involvement in the incident. **State v. Jacobs**, 1.

Cross-examination—limitation—The trial court did not err in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by limiting the cross-examination of a State's witness including questions regarding the witness's prior convictions for simple assault and probationary status, and regarding a transcript of plea the witness signed prior to defendant's trial. **State v. Jacobs**, 1.

Cross-examination not allowed—other testimony—harmless error—Any error in not allowing cross-examination of plaintiff's expert in a medical malpractice action as to whether a former codefendant had met the standard of care was harmless where several other experts gave equivalent testimony. **Boykin v. Kim**, 278.

Dead man's statute—direct interest in property—inchoate dower rights—The wife of the plaintiff disputing an estate had a direct legal interest in the property through inchoate dower rights and was disqualified from testifying

EVIDENCE—Continued

about oral communications between herself and the decedent or overheard conversations between her husband and decedent. **Taylor v. Abernethy, 93.**

Dead man's statute—party to action—interest in outcome—The trial court properly prohibited defendant from testifying about conversations he had with the decedent in an action involving a contract to make a will. Testimony is prohibited from witnesses who are parties to the action or who have a direct pecuniary interest in the event. **Taylor v. Abernethy, 93.**

Denial of motion to introduce additional evidence—failure to show prejudice—The trial court did not abuse its discretion in a first-degree statutory rape case by refusing to reopen the trial to permit defendant to introduce additional evidence, because: (1) evidence about defendant's work schedule had already been admitted; and (2) defendant failed to show how he was prejudiced by the trial court's refusal to allow an additional witness to testify about driving him to and from work. **State v. Hoover, 596.**

Failure to allow expert testimony—psychologist—The trial court did not err in a prosecution for first-degree murder, first-degree rape, and other crimes by excluding testimony of defendant's psychologist concerning certain conversations he had with defendant, because the State did not choose to explore the basis for the defense expert's opinion at trial and the trial court was thus not obligated to allow the expert to testify regarding the statements made by defendant. **State v. Edwards, 490.**

Gang membership and colors—identification—admissible—The trial court did not err in a prosecution for first-degree murder by admitting evidence that defendant was a gang member. Defendant's identity was in issue and the gang color and defendant's gang involvement helped the witness in identifying defendant. **State v. Medina, 723.**

Handwriting expert—opinion admissible—A handwriting expert was properly allowed to give his opinion about the genuineness of decedent's signature on a contract to make a will. **Taylor v. Abernethy, 93.**

Hearsay—decedent's letters and envelopes—handwriting sample—corroboration of intent to make will—In an action on a contract to make a will, letters and envelopes from the decedent were admissible to corroborate the decedent's intent, as a handwriting sample, and to rebut defendant's assertion that the decedent would never have signed anything like the contract. **Taylor v. Abernethy, 93.**

Lay opinion—defendant trying to kill officer—The trial court did not err in an attempted first-degree murder prosecution by admitting the lay opinion of various law enforcement officers that defendant "tried to kill" an officer. The testimony of the officers amounted to nothing more than shorthand statements of fact based on their knowledge and observations. **State v. McVay, 335.**

Out-of-court statement—door opened on cross-examination—no error—Defense counsel opened the door during cross-examination to an out-of-court statement by defendant's cousin (Jorge), and the statement was correctly admitted during redirect examination. **State v. Medina, 723.**

Prior crimes or bad acts—assault inflicting serious injury—The trial court erred in an assault case by admitting and publishing to the jury evidence of a

EVIDENCE—Continued

prior conviction for assault inflicting serious injury, and the case is remanded for a new trial because the bare fact of a defendant's prior conviction would not be probative of any legitimate Rule 404(b) purpose; rather, it is the circumstances underlying such a conviction that hold probative value. **State v. McCoy, 105.**

Prior crimes or bad acts—drugs—intent—knowledge—The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case by allowing officers to testify as to the facts and circumstances underlying defendant's two prior convictions for the same offense pursuant to N.C.G.S. § 8C-1, Rule 404(b) for the limited purpose of showing defendant's intent and knowledge. While the testimony of a deputy clerk regarding defendant's guilty pleas in the two prior cases was inadmissible under Rule 404(b), the error was rendered harmless when defendant testified and was properly cross-examined about the convictions under N.C.G.S. § 8C-1, Rule 609(a). **State v. Renfro, 402.**

Prior crimes or bad acts—impersonation of law officers—instruction on limited purpose—The trial court did not abuse its discretion in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by admitting evidence of defendant's prior bad acts including defendant dressing up as a law enforcement officer and robbing another individual at his home two days after the robbery of the victims in this case. **State v. Jacobs, 1.**

Prior crimes or bad acts—sexual harassment of other inmates—The trial court did not commit plain error in a second-degree sexual offense case by admitting testimony that defendant had sexually harassed other inmates in the Brunswick County jail. **State v. Locklear, 547.**

Prior inconsistent statements—impeachment—refreshing memory with prior custodial statements—The trial court did not err in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by admitting evidence of two coparticipants' prior inconsistent statements when the State impeached the coparticipants with their prior custodial statements after allowing them to refresh their memory by looking through their statements, because the record demonstrates the coparticipants were testifying contrary to the expectations of the State and there is no indication that the State called the witnesses or used their impeachment as a mere subterfuge to get evidence before the jury which was otherwise inadmissible. **State v. Jacobs, 1.**

Testimony—pediatric doctor—nurse practitioner—sexual abuse—The trial court did not err in a termination of parental rights case by allowing a pediatric doctor and nurse practitioner to testify regarding the minor child's alleged sexual abuse. **In re B.D., 234.**

Trial court instruction to attorney on how to elicit evidence or admissible testimony—plain error analysis inapplicable—failure to object—The trial court did not commit plain error in a termination of parental rights case by allegedly instructing petitioner's attorney during her case-in-chief on how to elicit evidence or admissible testimony. **In re B.D., 234.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by convicted felon—failure of indictment to allege date of prior felony conviction—The trial court did not lack jurisdiction to try

FIREARMS AND OTHER WEAPONS—Continued

defendant for the charge of possession of a firearm by a convicted felon even though the indictment charging defendant with this offense failed to allege the date of the prior felony conviction, because: (1) the provision of N.C.G.S. § 14-415.1(c) that requires the indictment to state the conviction date for the prior offense is merely directory; and (2) the omission was not material and does not affect a substantial right, especially when defendant stipulated to the prior conviction at trial and challenged only whether he was in possession of a firearm. **State v. Inman, 567.**

FRAUD

Trespass and vandalism problem on property—reasonable reliance upon representations—The trial court did not err by concluding that defendant committed fraud even though defendant contends plaintiffs failed to demonstrate that they were denied the opportunity to investigate the pertinent property or that they could not have discovered the trespass and vandalism problem through the exercise of due diligence, where the trespass problem was a material fact which defendant deliberately concealed in order to realize a substantial profit on the sale of her property. **Willen v. Hewson, 714.**

HIGHWAYS AND STREETS

Planning approval—plat—upgrade to county road from private drive—The trial court had sufficient evidence to support its conclusions that a road labeled “right-of-way private drive” on a recorded plat could be upgraded to provide access to acreage which plaintiffs wished to subdivide. The long-time director of the Planning Department testified that it was the usual custom of the Planning Department to upgrade private drives to county standard roads, and that developers typically left forty-five foot rights-of-way on plats to preserve options for future development. **Darbo v. Old Keller Farm Prop. Owners’ Ass’n, 591.**

HOMICIDE

Attempted first-degree murder—short-form indictment—A short-form indictment using language from N.C.G.S. § 15-144 properly charged defendant with attempted first-degree murder. **State v. McVay, 335.**

Attempted first-degree murder—specific intent to kill—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant’s motion to dismiss the charge of attempted first-degree murder of a child, because the State presented sufficient evidence that defendant possessed the specific intent to kill the child including that: (1) defendant left a six-week-old baby with a towel knotted around her face in a collapsing shed some distance from the nearest house with temperatures in the 30-degree range; (2) during the next two days defendant did nothing to retrieve the child or assure her discovery by others; and (3) defendant acted in order to avoid paying child support. **State v. Pittman, 745.**

Attempted first-degree murder—specific intent to kill—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant’s motion to dismiss the charge of attempted murder of an 11-month old child,

HOMICIDE—Continued

because the evidence viewed in the light most favorable to the State revealed that: (1) a jury could reasonably conclude from the facts that defendant knew that no one would discover the mother's body and the child for a long time in a deserted area; and (2) the evidence was sufficient for a jury to decide that defendant would not expect an 11-month-old child to survive in a remote location, but would starve, die of dehydration, and or exposure, or suffer from such effects of nature as insects and wild animals before anyone found him. **State v. Edwards, 490.**

Attempted voluntary manslaughter—valid offense—Defendant's contention that attempted voluntary manslaughter is not an offense was overruled; the Court of Appeals is without authority to ignore its own precedent. **State v. Yang, 755.**

First-degree murder—eliminating option of not guilty—new trial—The trial court committed plain error by omitting the option of not guilty of first-degree murder in its final mandate to the jury and on the verdict sheet, and defendant is entitled to a new trial. **State v. McHone, 289.**

First-degree murder—short-form indictment—valid—An indictment which did not address all of the elements of first-degree murder was valid. **State v. Oglesby, 658.**

Indictments—attempted voluntary manslaughter—Indictments were sufficient to support defendant's convictions for attempted voluntary manslaughter where they alleged that defendant "did unlawfully, willfully, and feloniously and of malice aforethought attempt to kill and murder [the victim and her father]." **State v. Yang, 755.**

Second-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by granting defendants' motion to dismiss the charge of second-degree murder after the return of a verdict of guilty but before entry of judgment because while the State's evidence raises a strong suspicion of defendants' guilt, it does not permit a reasonable inference that defendants were responsible for the death of the victim. **State v. Myers, 526.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Bylaws—contract with doctor—There was no issue of fact as to whether defendant-hospital's bylaws constituted a contract with a doctor whose staff privileges were suspended. **Lohrmann v. Iredell Mem'l Hosp., Inc., 63.**

Certificate of need—subject matter jurisdiction—exhaustion of administrative remedies—Plaintiffs' failure to exhaust administrative remedies meant that the trial court lacked subject matter jurisdiction over claims arising from the denial of a certificate of need to replace and expand a hospital. The court properly dismissed plaintiffs' constitutional claims and request for a declaratory judgment. **Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 266.**

Denial of certificate of need—dismissal of injunctive claim—failure to exhaust administrative remedies—Failure to exhaust adequate administrative remedies properly resulted in the dismissal of a claim for injunctive relief arising from the denial of a certificate of need to replace and expand a hospital. **Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 266.**

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

Suspension of doctor's privileges—not unreasonable or unfair—A hospital's decision to suspend a doctor's staff privileges was not arbitrary and capricious or based on irrelevant considerations, and was based upon the reasonable objectives and regulations of the hospital. **Lohrmann v. Iredell Mem'l Hosp., Inc., 63.**

Suspension of medical privileges—by-laws not breached—There was no genuine issue of material fact on the question of whether defendant-hospital breached its by-laws in suspending plaintiff's medical privileges, and summary judgment was properly granted for defendant. **Lohrmann v. Iredell Mem'l Hosp., Inc., 63.**

Suspension of medical privileges—by-laws not breached—applicable to formal hearing—A hospital complied with its bylaws in suspending a doctor's staff privileges where the doctor contended that he had not been given copies of nurses's complaints and notice of an executive committee meeting at which those complaints were considered. **Lohrmann v. Iredell Mem'l Hosp., Inc., 63.**

Suspension of medical privileges—grounds—N.C.G.S. § 131E-85 provides that a hospital may take into account the judgment and character of a physician, as well as the reasonable objectives and regulations of the hospital, in suspending a physician's privileges. In this case although plaintiff contended that his privileges were suspended solely for violating patients' rights concerning living wills and control of decisions, other factors were clearly at issue throughout the corrective proceedings. **Lohrmann v. Iredell Mem'l Hosp., Inc., 63.**

IMMUNITY

Governmental—action for injunction—trespass on beachfront land—*Shingleton v. State*, 260 N.C. 451, precluded plaintiffs' argument that sovereign immunity was waived by N.C.G.S. § 41-10.1 for a claim for an injunction restraining interference by the State with plaintiffs' exclusive use of beachfront property. Property owners cannot maintain an action against the State to restrain the commission of a tort where they cannot maintain the action in tort. Plaintiffs could have brought individual capacity claims against State officers, but did not. **Fabrikant v. Currituck Cty., 30.**

Governmental—beachfront land—quiet title action—no claim of title—Plaintiffs failed to allege facts sufficient to constitute a waiver of the State's sovereign immunity under N.C.G.S. § 41-10.1 and their claim to quiet title to the dry sand area in front of beachfront property was properly dismissed. **Fabrikant v. Currituck Cty., 30.**

Governmental—building inspector—public official—The trial court should have dismissed a claim against a building inspector in his individual capacity because the inspector was a public official who may not be held personally liable for mere negligence. The inspector's position was created by statute, he exercised a portion of the sovereign power, and his work required discretion. **McCoy v. Coker, 311.**

Governmental—claims against building inspector and county—not duplicative—same immunity—The trial court did not err by denying a building inspector's motion to dismiss a claim against him in his official capacity where

IMMUNITY—Continued

the County was not immune. The public officer holds the same immunity, if any, as the governmental immunity; although the building inspector here contended that claims were duplicative, a plaintiff may bring suit against both a governmental entity and its public officer (with but one recovery). **McCoy v. Coker, 311.**

Governmental—negligent building inspection—accidental—insurance coverage—An allegedly negligent building inspection was an accident under Wayne County's insurance policy, the policy covered the claim, immunity was waived, and the trial court properly denied the County's motion for summary judgment. Although the inspection and issuance of a certificate of occupancy were intentional, it was neither intended nor expected that plaintiff's property would be rendered uninhabitable and that plaintiff would suffer health problems. **McCoy v. Coker, 311.**

Governmental—waiver—pleadings—Waiver of governmental immunity must be specifically alleged, but precise language is not necessary as long as sufficient allegations are present to provide a reasonable forecast of waiver. The determination is limited to the complaint and its attachments. **Fabrikant v. Currituck Cty., 30.**

INDICTMENT AND INFORMATION

Sentencing factors—not required—Sentencing factors are not required to be alleged in the indictment. **State v. Jordan, 479.**

INDIGENT DEFENDANTS

Attorney fees—court-appointed attorney—notice and opportunity to be heard—The trial court erred in imposing attorney fees upon defendant for his court-appointed attorney pursuant to N.C.G.S. § 7A-455, and the case is remanded for a hearing, because while the transcript reveals that attorney fees were discussed following defendant's conviction, there was no indication that defendant was notified of and given an opportunity to be heard regarding his appointed attorney's total hours or the total amount of fees imposed. **State v. Jacobs, 1.**

INSURANCE

Automobile—underinsured motorist coverage—rejection form—proper—The trial court's grant of summary judgment for the unnamed defendant Allstate was proper in underinsured motorist claims based upon the insured's rejection of such coverage. Although plaintiff argues that Allstate's form deviates from the form promulgated by the Rate Bureau, Allstate's Selection/Rejection form uses the precise wording contained in the Rate Bureaus' form in its entirety, with the inclusion of additional language explaining the coverage. Moreover, the presentation of the text is completely legible and does not impede the intent that consumers make an informed decision when selecting or rejecting coverage although it is in ten point type rather than the twelve point type set forth in the Rate Bureau's form. **Stegenga v. Burney, 196.**

Commercial liability policy—voluntary payments clause—summary judgment incorrectly granted—Summary judgment should not have been granted for defendant-insurance company for breach of a voluntary payments clause

INSURANCE—Continued

where plaintiff began to install a roof on a school, the temporary seal leaked, plaintiff hired a company to clean up the water damage, and defendant denied coverage. Even assuming a breach of the voluntary payments clause, defendant is not entitled to summary judgment because it made no showing of prejudice. **Bond/Tec, Inc. v. Scottsdale Ins. Co.**, 820.

Underinsured motorist coverage—renewed older policy—no opportunity to select or reject—A total failure on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by the policy owner. Such failure should not invoke the minimum limits established by N.C.G.S. § 20-279.21(b)(4) and shield the insurer from additional liability, and the trial court did not err by determining that the insured was entitled to UIM coverage of \$1 million per person and \$1 million per accident. **Williams v. Nationwide Mut. Ins. Co.**, 601.

INTEREST

Loans—usury—Consumer Finance Act—The trial court did not err by entering summary judgment for plaintiffs on the issues of whether defendants violated the Consumer Finance Act and made usurious loans when Advance Internet customers were required to repay both a cash advance that was purportedly a “rebate” on an internet services contract and an additional fee of at least 20% of the amount of cash received where the internet access that was the ostensible subject of the contract had little or no monetary value. **State ex rel. Cooper v. NCCS Loans, Inc.**, 630.

JUDGES

Retired judge—unfulfilled expungement order—authority of current judge—A superior court judge had jurisdiction to reconsider an expungement order not wholly acted upon that was originally issued by a now retired judge. **In re Expungement of Kearney**, 213.

JUDGMENTS

Consent—construction of driveway—value of plaintiff's labor—A consent order for the building of a driveway to benefit both parties did not permit plaintiff, who had worked in the business, to charge defendant for the value of his services in building the driveway. Read in context, the term “labor costs” includes only hired labor. **Reaves v. Hayes**, 341.

Prejudgment interest—awarded before settlement setoff—Prejudgment interest is to be awarded before the set-off for a settlement amount; assuming preservation of the issue for appeal, there was no error in a medical malpractice action in the assignment of interest and costs between two doctors, one of whom had settled earlier. It would be contrary to the plain meaning of N.C.G.S. § 1B-4 to allow the settling party to be liable beyond the consideration in the release. **Boykin v. Kim**, 278.

JURISDICTION

Choice of law—procedural issues—North Carolina law—Although a choice of law provision in a contract to make a will specified Pennsylvania law, North

JURISDICTION—Continued

Carolina law governs all matters procedural when a lawsuit is filed in North Carolina regarding the validity of a contract made in another state. The trial court did not err by instructing the jury that the burden of proof was by the greater weight of the evidence. **Taylor v. Abernethy, 93.**

Standing—homeowners association—A homeowners association did not have standing to pursue individual lot owners' claims where the individual lot owners were necessary parties. **N.C. Dep't of Transp. v. Stagecoach Village, 825.**

JUVENILES

Questioning—requested presence of aunt denied—not a parent, custodian, or guardian—A juvenile defendant had no right to the presence of an aunt during questioning pursuant to N.C.G.S. § 7B-2101, and his motion to suppress was correctly denied, because the aunt was not a custodian or guardian where defendant had never lived with the aunt, she neither had custody of him nor signed school papers on his behalf, and there was nothing to indicate that any governmental entity conferred legal authority on the aunt. **State v. Oglesby, 658.**

KIDNAPPING

Second-degree—instruction—plain error analysis—The trial court did not commit plain error by instructing the jury that it could convict defendant of second-degree kidnapping if it found that the victims were restrained “for the purpose of commission of burglary and armed robbery” when the indictment alleged that the victims were restrained “for the purpose of facilitating the commission of . . . robbery” because (1) the trial court’s instruction actually added a second crime to the purpose of the restraint thereby placing a higher burden of proof on the State; and (2) compelling evidence supported the additional theory submitted by the trial court, and the jury found defendant guilty of the crime giving rise to it. **State v. Jacobs, 1.**

Second-degree—motion to dismiss—sufficiency of evidence—restraint—The trial court did not err by denying defendant’s motion to dismiss the second-degree kidnapping charges arising from the events of 18 November and 25 December 2002 even though defendant contends there was insufficient evidence of restraint, because: (1) hospital staff testified that defendant restrained the victim by refusing to allow her to seek medical treatment for a broken arm on or around 18 November 2002; and (2) an officer also testified that on 26 December 2002 the victim told him that defendant had been holding her against her will for days and would not let her contact her family. **State v. McCoy, 105.**

LACHES

Misappropriation of trade secrets from purchased company—no delay in action—Plaintiffs were not barred by laches from seeking relief for a competitor’s hiring of its managers and the misappropriation of trade secrets. There was no delay in bringing the action and no prejudice. **Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 49.**

LARCENY

Indictment—corporation—entity capable of owning property—An indictment was sufficient to charge defendant with larceny and possession of stolen items even though defendant contends the named owner-entity “N.C. FYE, Inc.” does not import an entity capable of owning property, because: (1) the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment; and (2) the abbreviation “Inc.” imports the entity’s ability to own property. **State v. Cave, 580.**

Possession of stolen goods—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant’s motion to dismiss the charges of larceny and possession of stolen goods, because: (1) defendant’s own testimony supports the trial court’s denial of his motion to dismiss when defendant told the officers that he was the responsible party and not the codefendants; and (2) there was sufficient evidence taken in the light most favorable to the State based on evidence presented by the State, the testimony of store employees where merchandise had been stolen, the testimony of investigating officers, and evidence presented by defendant through his testimony and that of his codefendant. **State v. Cave, 580.**

MEDICAL MALPRACTICE

Instructions—proximate cause and joint liability—not misleading in context—The jury was not misled in a medical malpractice action by instructions on proximate cause and joint and several liability. All of the instructions came directly from the North Carolina Pattern Jury Instructions and it cannot be shown that the instructions, in context, were misleading. **Boykin v. Kim, 278.**

Insulating negligence—instruction not given—The trial judge did not err by failing to instruct the jury on insulating negligence where that theory was not pled and it was not evident from the record that both parties understood the issue to be tried by implied consent. **Boykin v. Kim, 278.**

Standard of care—out-of-state expert—sufficiently qualified—A Johns Hopkins professor was competent to testify as an expert to the appropriate standard of care of a neurologist in Wilkes County where he based his opinion on demographic data and his familiarity with similar communities, was licensed in North Carolina and had practiced in multiple communities in the State, and was board certified in the same specialty as defendant. Moreover, his testimony presented issues of fact as to whether defendant breached the standard of care, and summary judgment for defendant was reversed. **Billings v. Rosenstein, 191.**

MOTOR VEHICLES

Driving while impaired—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant’s motion to dismiss the charge of impaired driving, because: (1) defendant admitted she had consumed alcohol prior to driving, a fact confirmed by the breathalyzer result and an open half-filled bottle of vodka found in the passenger area of her vehicle; (2) an officer smelled an odor of alcohol when he approached defendant’s vehicle a second time and also testified that in his opinion defendant’s faculties were appreciably impaired; and (3) nothing in the record indicated that defendant requested the

MOTOR VEHICLES—Continued

jury to designate on the verdict sheet which prong of the statute it found defendant to have violated. **State v. Wood, 790.**

Felonious fleeing to elude arrest—instructions—failure to define terms—The trial court did not commit plain error in instructing the jury on the charge of felony fleeing by motor vehicle to elude arrest because if failed to define the terms “reckless driving,” “negligent driving,” and “driving with license revoked.” **State v. Wood, 790.**

Felonious fleeing to elude arrest—instructions—gross impairment—The trial court did not commit plain error in a felonious fleeing to elude arrest case by failing to define the legal requirements for the necessary element of “gross impairment” in the jury instructions, because: (1) the language used in the statute and jury instructions accords with the ordinary meaning of the term “grossly impaired” and is understandable; and (2) the legislature did not intend for the words “gross impairment” to mean anything other than their common and ordinary meaning. **State v. Stokes, 447.**

Felonious fleeing to elude arrest—motion to dismiss—sufficiency of evidence—There was sufficient evidence to show that defendant was grossly impaired so as to support a verdict of guilty of felonious fleeing to elude arrest based upon aggravating factors of reckless driving and gross impairment, and the State was not required to submit evidence of a third aggravating factor of speeding in excess of fifteen miles per hour over the speed limit. **State v. Stokes, 447.**

Felonious fleeing to elude arrest—sufficiency of indictment—The indictment was sufficient to charge defendant with felonious fleeing to elude arrest because the language of the indictment tracks N.C.G.S. § 20-141.5, and alleges all of the elements defined by the statute and the elements necessary to elevate the offense from a misdemeanor to a felony. **State v. Stokes, 447.**

Felonious fleeing to elude arrest—theory of guilt—The trial court in a prosecution for felonious fleeing to elude arrest did not improperly instruct the jury on a theory of guilt different from that set forth in the indictment, because: (1) although the State alleged three aggravating factors in the indictment to support the charge, the plain language of the statute only requires proof of two or more of the factors to support a felony conviction; and (2) the State’s evidence supported the charges of defendant’s reckless driving and gross impairment set forth in the indictment. **State v. Stokes, 447.**

New trial denied—instructions proper—A new trial was not warranted for erroneous and inadequate instructions in an automobile accident case where the court properly instructed the jury. **Osetek v. Jeremiah, 438.**

Rear-end collision—contributory negligence—directed verdict denied—The trial court correctly granted plaintiff’s motion for directed verdict on contributory negligence in an automobile accident a case where plaintiff testified that she was stopped at a stop sign when she was hit, and defendant admitted that he was looking to his left as he drove straight ahead and that he could have seen plaintiff’s car if he had been looking. Defendant failed to offer any evidence that plaintiff was negligent. **Osetek v. Jeremiah, 438.**

NEGLIGENCE

Professional—prima facie—evidence not sufficient—Plaintiff's forecast of evidence failed to establish any of the essential elements of prima facie professional negligence by defendant engineer in a case which arose from increased run-off from developing a subdivision. **Rainey v. St. Lawrence Homes, Inc., 611.**

Project expediter—failure to perform duties under contract with State—The trial court did not err by dismissing plaintiff's negligence claim in an action where a project expediter sued a prime contractor for its failure to properly perform the duties under its contract with the State, because: (1) evidence of negligent performance by a prime contractor of its duties under a contract with the State is legally insufficient to support a verdict based on negligence; and (2) plaintiff's only cause of action was under N.C. Gen. Stat. § 143-128. **D.W.H. Painting Co. v. D.W. Ward Constr. Co., 327.**

NUISANCE

Run-off from new development—summary judgment—Summary judgment was correctly granted for two defendants, but not the third, on nuisance and trespass claims arising from water running onto plaintiff's property from a new subdivision. Plaintiff's forecast of evidence was that St. Lawrence's development contributed to the unreasonable increase in the volume of water and that plaintiff's property was damaged by the increased run-off. No such evidence as presented as to the other defendants. **Rainey v. St. Lawrence Homes, Inc., 611.**

PARTIES

Necessary—homeowners association—individuals—Necessary parties are those so vitally interested that a valid judgment finally determining the controversy cannot be rendered without them. The trial court here did not err by concluding that individual lot owners with easements over a common area taken by DOT are necessary; the owners of the easements have a material interest in receiving just compensation for their easements. **N.C. Dep't of Transp. v. Stagecoach Village, 825.**

Proper—individual lot owners—common area taken by DOT—The trial court did not abuse its discretion by concluding that individual lot owners in a subdivision were proper parties to an action involving the taking of common area property by DOT. **N.C. Dep't of Transp. v. Stagecoach Village, 825.**

PHARMACISTS

Working hours—regulation—Any regulation of pharmacies by N.C.G.S. §§ 90-85.6, 90-85.21, and 90-85.32 does not extend to regulating pharmacists' working hours. The trial court correctly ruled that plaintiff Board of Pharmacy was not acting within its authority when it adopted such a rule. **N.C. Bd. of Pharmacy v. Rules Review Comm'n, 301.**

PHYSICIANS AND SURGEONS

Suspension of staff privileges—notice of charges—A doctor whose staff privileges were suspended by a hospital had sufficient notice of the charges

PHYSICIANS AND SURGEONS—Continued

against him to be able to present facts and defend his conduct at a panel of medical staff members. **Lohrmann v. Iredell Mem'l Hosp., Inc.**, 63.

PLEADINGS

Information and belief—admitted by default judgment—There is no North Carolina law to preclude the entry of default judgment where the allegations are based on information and belief. Here, the trial court did not err by finding on remand that defendant had admitted the allegations in plaintiff's complaint; in addition to the complaint, plaintiff submitted sworn affidavits and the court heard evidence from experts on both sides. **Blankenship v. Town & Country Ford, Inc.**, 764.

Motion to amend—additional party—The trial court did not abuse its discretion by allowing plaintiff's motion to amend the complaint to add John Gill as a defendant and by entering summary judgment against him individually, because: (1) defendants failed to appeal the order allowing Gill's addition as a defendant; (2) regardless of whether N.C.G.S. § 57C-3-30(b) restricts the circumstances in which a member of a limited liability company may be added as a party to a lawsuit, N.C.G.S. § 57C-3-30(a) anticipates that a member who is also a manager, director, executive, or any combination thereof might be made a defendant and become personally liable by reason of his own acts or conduct; and (3) defendant had the right to offer evidence opposing summary judgment, notwithstanding his failure to file an answer, but defendant offered no evidence contradicting plaintiff's assertion that he directed and controlled the illegal activities of corporate defendants. **State ex rel. Cooper v. NCCS Loans, Inc.**, 630.

PRISONS AND PRISONERS

Malicious conduct by prisoner—failure to allege defendant in custody—notice—The trial court had jurisdiction to proceed with the trial of a charge of malicious conduct by a prisoner even though the indictment did not allege that defendant was in custody, because: (1) the purpose behind alleging that defendant was in custody is to give him proper notice of the charges against him; (2) the evidence tended to show that defendant was an inmate at the Pitt County Detention Center, he was incarcerated when he received notice of the charges, and he raised no objection that he was unaware of the facts giving rise to the charges; and (3) no conclusion could be reached other than that defendant was in custody. **State v. Artis**, 668.

PROCESS AND SERVICE

Service on sheriff and deputy—agent of clerk of court—Appellants did not comply with statutory requirements in serving a sheriff and a deputy because the deputy who executed service had not been designated as the agent of the clerk of court, as required by N.C.G.S. § 162-16. **Mabee v. Onslow Cty. Sheriff's Dep't**, 210.

PSYCHOLOGISTS AND PSYCHIATRISTS

Licensure also as counselor—degree of supervision—The Psychology Board could not require petitioner to be supervised in his licensed professional

PSYCHOLOGISTS AND PSYCHIATRISTS—Continued

counselor (LPC) practice by virtue of his psychological associate licensure (LPA) despite the fact that his activities need not be supervised under his LPC licensure. The General Assembly has enacted statutory limitations on a board's authority to regulate individuals that are not licensed by that board but that are qualified members of other professional groups, even if those individuals' activities arguably fall within the ambit of the board's regulatory authority. **Trayford v. N.C. Psychology Bd.**, 118.

REAL PROPERTY

Landing—burden of proof—prima facie record title—on-the-ground location of landing—The trial court erred in an action to quiet title and for a declaratory judgment regarding the ownership of a landing by granting defendant a directed verdict at the close of all evidence on the ground that plaintiffs failed to locate the description of the landing contained in their chains of title on the earth's surface. **Hill v. Taylor**, 415.

Landing—Marketable Title Act—possession exception—The trial court erred in an action to quiet title and for a declaratory judgment regarding the ownership of a landing by granting defendant's motion for directed verdict as to plaintiffs Elizabeth B. Wilson, L. Jarvis Herring, Sally Herring, and Suzanne Hill, but did not err by granting defendant's motion for directed verdict as to Gene W. Morrison, because: (1) plaintiffs established prima facie ownership of an easement in the landing pursuant to *Realty Co. v. Hobbs*, 261 N.C. 414 (1964), and the Marketable Title Act; (2) the possession exception did not preclude plaintiffs from relying on the Marketable Title Act to establish prima facie ownership; (3) defendant's possession only protected whatever interest defendant owned at the commencement of the action, which was the date the marketability of plaintiffs' title was determined; (4) it was within the province of the jury to determine whether plaintiffs owned interests in the landing and, if so, whether defendant owned an interest which defeated plaintiffs' interests; and (5) Gene W. Morrison did not offer a thirty-year connected chain of title under the Marketable Title Act and failed to demonstrate prima facie ownership of an easement in the landing. **Hill v. Taylor**, 415.

ROBBERY

Armed—taking property after victim's death—sufficiency of evidence—The trial court did not err by failing to dismiss the armed robbery charge against defendant based on alleged insufficient evidence, because: (1) the fact that the victim is already dead when her possessions are taken has not previously been an impediment in this jurisdiction to the defendant's conviction for armed robbery; and (2) two witnesses testified that defendant told them he killed the victim. **State v. McHone**, 289.

SEARCH AND SEIZURE

Motion to suppress evidence—unlawful entry—fruit of the poisonous tree—The trial court erred in a first-degree murder case by denying defendant's motion to suppress the evidence found during the search of the victim's residence at which defendant also resided, and defendant is entitled to a new trial, where the victim's brother removed a window air conditioner in order to enter

SEARCH AND SEIZURE—Continued

the residence and allowed officers to enter, officers entered without a search warrant and discovered what appeared to be bloodstains, and officers then obtained a search warrant and discovered the victim's body in the residence, because: (1) defendant had standing to challenge the officers' initial warrantless entry into the residence; (2) exigent circumstances did not exist to justify the officers' warrantless entry into the residence; and (3) the officers' initial warrantless entry into the residence was unlawful and the subsequent search warrant was based upon "fruit of the poisonous tree." **State v. McKinney, 138.**

SENTENCING

Aggravated range—Blakely error—The trial court in a felonious breaking and entering case did not sentence defendant in the aggravated range in violation of his Sixth Amendment right to a jury trial because, contrary to defendant's assertion, his sentence falls within the presumptive range. Thus, the trial court's findings of aggravating factors not admitted by defendant or submitted to the jury did not violate *Blakely v. Washington*, 542 U.S. 296 (2004). **State v. Garcia, 498.**

Aggravating factors—consolidated judgment—most serious offense—The trial court did not improperly aggravate defendant's sentence by an aggravating factor based upon the same evidence used to prove an element of sexual offense by a person in a parental role where defendant's convictions for that offense were consolidated for judgment with convictions for first-degree sexual offense with a child under thirteen; aggravating factors applied to a sentence for a consolidated judgment apply only to the most serious offense in that judgment, which was the first-degree sexual offense; and defendant's sentence was thus not derived from sexual offense by a person in a parental role because it was not the most serious offense in the consolidated judgment. **State v. Massey, 216.**

Aggravating factors—failure to submit to jury—The trial court erred in an impersonation of a law enforcement officer, armed robbery, burglary, and kidnapping case by sentencing defendant in the aggravated range without submitting the aggravating factors to the jury for proof beyond a reasonable doubt, and the case is remanded for resentencing. **State v. Jacobs, 1.**

Aggravating factors—failure to submit to jury—The trial court erred in imposing an aggravated sentence for a robbery with a dangerous weapon based upon the court's finding an aggravating factor not admitted by defendant or found by a jury beyond a reasonable doubt, and the case is remanded for a new sentencing hearing. **State v. Whitehead, 165.**

Aggravating factors—failure to submit to jury—The trial court erred in an assault case by imposing an aggravated sentence when no aggravating factor was admitted by defendant, or found by the jury. Defendant would be entitled to a new sentencing hearing if defendant were not already awarded a new trial on other grounds. **State v. McCoy, 105.**

Aggravating factors—failure to submit to jury—Blakely error—The trial court erred by imposing aggravated sentences on defendant for multiple counts of first-degree sexual offense with a child under thirteen, multiple counts of felonious sexual acts with a minor over whom he assumed the position of parent residing in the home, and multiple counts of indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confi-

SENTENCING—Continued

dence to commit the offense without submitting this finding to the jury, and defendant is entitled to a new sentencing hearing. **State v. Massey, 216.**

Aggravating factors—failure to submit to jury—Blakely error—The trial court erred by activating defendant's suspended sentences arising from embezzlement convictions when those sentences were unconstitutionally aggravated in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), without defendant's stipulation or submission to and finding by the jury beyond a reasonable doubt, and the case is remanded for a new sentencing hearing. N.C. Gen. Stat. § 15A-1446(d)(18) permits a review of sentencing errors even though the defendant failed to object at trial. **State v. McMahan, 586.**

Aggravating factors—failure to submit to jury—Blakely error—The trial court erred when sentencing defendant in the aggravated range for armed robbery by finding an aggravating factor where the facts on which the factor was based were neither presented to the jury, proved beyond a reasonable doubt, nor stipulated by defendant. **State v. Oglesby, 658.**

Aggravating factors—failure to submit to jury—Blakely error—The trial court erred in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by sentencing defendant on an aggravating factor that it found without submitting the factor to the jury, and the case is remanded for resentencing in accordance with *Blakely*, 542 U.S. 296 (2004), and *Allen*, 359 N.C. 425 (2005). However, defendant's argument that the aggravating factor should have been alleged in the indictment has already been rejected by *Allen*. **State v. Pittman, 745.**

Enhancement for habitual offenders—not cruel and unusual punishment—Defendant's sentence as an habitual felon did not constitute cruel and unusual punishment in violation of his Eighth Amendment rights in a felonious breaking and entering case. **State v. Garcia, 498.**

Enhancement for habitual offenders—not cruel and unusual punishment—The trial court's use of defendant's felony convictions to enhance his sentence under the habitual felon statutes did not constitute cruel and unusual punishment in violation of defendant's Eighth Amendment rights. **State v. Cummings, 772.**

Habitual felon—guilty plea—failure to satisfy requirements of N.C.G.S. § 15A-1022(a)—The trial court erred by accepting defendant's guilty plea to habitual felon status and by sentencing defendant for malicious conduct by a prisoner and habitual misdemeanor assault as an habitual felon because the trial court failed to satisfy the requirements of N.C.G.S. § 15A-1022(a) when the trial court did not: (1) determine that defendant understood the nature of the habitual felon charge; (2) inform defendant of his right to deny habitual felon status; or (3) inform defendant that his admission of attaining habitual felon status would waive his right to jury determination of that issue. **State v. Artis, 668.**

Habitual misdemeanor assault—absence of arraignment—stipulation of prior convictions—The trial court did not commit prejudicial error by its failure to arraign defendant on an habitual misdemeanor charge or to ask defendant whether he wanted the issue regarding his prior convictions submitted to the jury where defendant requested at trial that his prior convictions not be shared with

SENTENCING—Continued

the jury, and defense counsel, after consultation with defendant, stipulated to the prior convictions. N.C.G.S. § 15A-928. **State v. Artis, 668.**

Habitual offender—not cruel and unusual—The trial court's use of seven prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act was consistent with N.C.G.S. § 15A-1340.14 and with legislative purpose and was not cruel and unusual punishment. **State v. Hall, 353.**

Mitigating factors—rendered substantial assistance leading to the identification, arrest, or conviction of any accomplices, accessories, or coconspirators—abuse of discretion standard—The trial court did not abuse its discretion in a drug case by failing to find that defendant rendered substantial assistance leading to the identification, arrest, or conviction of any accomplices, accessories, or coconspirators, because defendant made no showing that the trial court's failure to find that defendant rendered substantial assistance could not have been the result of a reasoned decision. **State v. Sims, 829.**

Prior convictions—indigency—insufficient evidence—A defendant being sentenced failed to meet his burden of proving that he was indigent at the time of challenged prior convictions. **State v. Jordan, 479.**

Prior convictions—jury findings—not required—Jury findings were not required where a defendant sentenced within the presumptive range challenged his prior convictions. The State met its burden by presenting certified records, and the trial court was entitled to sentence defendant in the presumptive range without further proof. **State v. Jordan, 479.**

Prior convictions—presumption of regularity—right to counsel—Prior convictions were entitled to a presumption of regularity in a sentencing proceeding where the convictions were 20 years old and the records had been routinely destroyed. The trial court did not err by placing the burden of proof on defendant, who offered no reason that the presumption of regularity should not apply. **State v. Jordan, 479.**

Prior record level—stipulation—The trial court did not commit plain error in a possession with intent to manufacture, sell, or deliver cocaine case by sentencing defendant as a Class C Level IV offender, because the trial court did not use the worksheet which improperly calculated that defendant had fourteen record points to determine defendant's prior record level, but rather relied on defendant's stipulation that he was a Level IV felon with ten prior record points. **State v. Renfro, 402.**

SEXUAL OFFENSES

Multiple crimes—instructions—elements—The trial court did not commit plain error in a prosecution for sexual offenses by a person in a parental role and indecent liberties by failing to specifically instruct the jury on the elements of each offense on each date alleged where the court gave the pattern jury instructions for the alleged sexual offenses by a person in a parental role and distinguished those counts by assigning them different locations according to the victim's testimony, and the court also gave the pattern jury instructions for indecent liberties and then repeatedly instructed the jury that it had to find "separate and distinct acts" for the various counts. **State v. Massey, 216.**

SEXUAL OFFENSES—Continued

Short-form indictments—minor victim—sufficiency of charges—The short-form indictments used to charge defendant with multiple counts of first-degree sexual offense with a child under thirteen, multiple counts of felonious sexual acts with a minor over whom he assumed the position of parent residing in the home, and multiple counts of indecent liberties were not defective. **State v. Massey, 216.**

Variance between allegation and proof as to time—child sex abuse—statute of limitations not involved—The trial court did not improperly instruct the jury on theories of guilt not alleged in indictments for sexual offenses against a child when the date and time periods in the instructions were not specified in the indictments. **State v. Massey, 216.**

TAXATION

Ad valorem—appeal of appraisals—standard—Ad valorem tax appraisals are presumed correct. To rebut this presumption, the taxpayer must show that an arbitrary or illegal method was used and that the assessment substantially exceeded the true value of the property. **In re Appeal of Westmoreland-LG&E Partners, 692.**

Ad valorem—costs of preparing property for use—There was substantial evidence to support the Tax Commission's finding that the cost of a water treatment plant was necessary to prepare a taxpayer's electricity generating facilities for their intended use, despite the donation of the water treatment plant to a local town. The county's guidelines require it to tax all costs necessary to make personal property ready for its intended use; excluding this cost would result in assessment inequities with similar tax payers. **In re Appeal of Westmoreland-LG&E Partners, 692.**

Ad valorem—valuation—electrical generating facilities—inclusion of power purchasing agreements—The proper market against which to judge the value of taxpayer's plants under the income approach includes power purchasing agreements (PPAs). The income under the PPAs is an essential part of the market for the taxpayer's property. **In re Appeal of Westmoreland-LG&E Partners, 692.**

Ad valorem—valuation—functional obsolescence—There was substantial evidence to support the Tax Commission's conclusion that a county properly considered the effect of functional obsolescence when assessing two coal-fired electrical generating plants. The circumstances of the taxpayer's business dealings do not impact the current functionality of the two facilities. **In re Appeal of Westmoreland-LG&E Partners, 692.**

Denial of alternate formula—redress—Petitioner was not without redress for the denial of the use of an alternate apportionment formula because N.C.G.S. § 105-267 provides an avenue for filing a civil action under the superior court's original jurisdiction. **Central Tel. Co. v. Tolson, 554.**

Refund—use of alternate apportionment formula—Augmented Board decision—controlling—The Augmented Tax Review Board's denial of petitioner's request to use an alternate apportionment formula controlled the Tax Review Board's decision on petitioner's refund claim because the ultimate issue was the

TAXATION—Continued

same, although different remedies were sought. **Central Tel. Co. v. Tolson, 554.**

Tax Review Board—jurisdiction—The trial court properly did not reach the merits of petitioner's tax refund claim where it correctly determined that the Tax Review Board lacked jurisdiction. **Central Tel. Co. v. Tolson, 554.**

Tax Review Board—jurisdiction—The Tax Review Board lacked subject matter jurisdiction over petitioner's refund claim because the claim rested on the use of an alternate formula, which the Augmented Tax Review Board had not authorized. The Augmented Tax Review Board is vested with exclusive power to allow use of any method not provided by statute, and the Tax Review Board properly dismissed the claim. **Central Tel. Co. v. Tolson, 554.**

Tax Review Board—jurisdiction—constitutional issues—As an administrative tribunal, the Tax Review Board lacked the authority or jurisdiction to make a determination regarding the constitutionality of the tax resulting from application of N.C.G.S. § 105-130.4. **Central Tel. Co. v. Tolson, 554.**

TERMINATION OF PARENTAL RIGHTS

Bench trial—hearsay—no showing of prejudice—Assuming that testimony in a termination of parental rights proceeding was inadmissible hearsay, respondent did not carry her burden of showing that the trial court relied on the incompetent evidence in making its findings. **In re L.O.K., J.K.W., T.L.W., & T.L.W., 426.**

Best interests of child—no showing of abuse of discretion—The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in the minor child's best interests to terminate parental rights, because respondents failed to demonstrate that they would provide care that promotes the minor child's healthy and orderly physical and emotional well-being. **In re B.D., 234.**

Findings of fact—refusal to sign release form related to treatment—The trial court did not err in a termination of parental rights case by finding as fact that respondent father refused to sign a release form related to his treatment at a local hospital. **In re B.D., 234.**

Findings of neglect—sufficiency—Findings that children had been neglected and that there was a probability of repetition if the children were returned to respondent's custody were sufficient to establish neglect. Furthermore, the trial court's conclusion that grounds existed for termination is supported by the court's findings establishing that respondent failed to maintain contact with her children for extended periods of time. **In re L.O.K., J.K.W., T.L.W., & T.L.W., 426.**

Grounds—willfully leaving child in foster care without demonstrating reasonable progress—The trial court did not err by concluding that sufficient grounds existed to terminate respondent father's parental rights including that respondent willfully left the minor child in foster care for more than twelve months without demonstrating any reasonable progress under the circumstances to correct those conditions which led to the minor child's removal. **In re B.D., 234.**

TERMINATION OF PARENTAL RIGHTS—Continued

Hearing—poor audio recording—no showing of prejudice—Respondent in a termination of parental rights hearing failed to show prejudice from a poor audio recording of the hearing where the record contains no indication that respondent made any attempt to reconstruct the missing material or that she was in any way unable to do so. **In re L.O.K., J.K.W., T.L.W., & T.L.W., 426.**

Holding special proceeding immediately prior to termination hearing—notice—The trial court did not err in a termination of parental rights case by holding the special hearing required by N.C.G.S. § 7B-1108(b) immediately prior to commencement of the termination hearing without giving respondents' notice ten days prior to the hearing, because: (1) both respondents denied all the material allegations of the petition in their answers thereby indicating that each of the grounds for termination alleged in the petition were in dispute; (2) as there were no issues remaining for the trial court to dispose of at the special hearing, neither respondent suffered prejudice as a result of the failure to notify respondents of the special hearing ten days prior to its commencement; and (3) the trial court inquired as to the parties' surprise and ability to prepare an adequate defense considering the absence of notice regarding the special hearing, and both parties indicated they were ready to proceed. **In re B.D., 234.**

Jurisdiction—failure to attach copy of custody order to petition—notice—The trial court did not lack jurisdiction in a termination of parental rights case based on petitioner's failure to attach to the petition a copy of the custody order regarding the minor child. **In re B.D., 234.**

Jurisdiction—failure to serve summons on minor child—The trial court did not lack jurisdiction in a termination of parental rights case based on an alleged failure to serve a summons on the minor child when the summons required by N.C.G.S. § 7B-1106(a)(5) was served upon the guardian ad litem's attorney advocate rather than the guardian ad litem. **In re B.D., 234.**

Jurisdiction—pending appeal of a custody order—The trial court did not lack jurisdiction in a termination of parental rights case even though issues arising out of a prior adjudication and disposition of abuse and neglect were currently pending before the Court of Appeals, because our Supreme Court has recently concluded that the pending appeal of a custody order does not deprive a trial court of jurisdiction of termination proceedings. **In re B.D., 234.**

Second petition after first voluntarily dismissed—not barred—DSS was not barred from filing a second petition to terminate parental rights after voluntarily dismissing its first petition. The Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the Legislature expressed in the Juvenile Code. **In re L.O.K., J.K.W., T.L.W., & T.L.W., 426.**

TRADE SECRETS

Compiled business information—construction equipment rental business—The trial court did not err by concluding that plaintiff's compilation of business information constitutes a trade secret. The trial court determined that the disputed information was not generally known outside the company, was only discreetly disclosed within the company, was guarded as a secret, was competitively valuable, was developed at significant cost, and was difficult to

TRADE SECRETS—Continued

acquire or duplicate. **Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 49.**

Construction rental companies—hiring branch managers—using confidential information—The trial court did not err in an action between construction equipment rental companies by finding that defendants misappropriated trade secrets through the hiring of branch managers who used plaintiff's confidential information to obtain sales and convert former customers. **Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., 49.**

TRESPASS

Failure to show affirmative defense—negligence—easement by necessity—easement implied from prior use—The trial court did not err by finding that plaintiff established a prima facie case of defendant's trespass for damage caused by the break in a stub-out on plaintiff's property from a water pipe serving defendant's property and that defendant failed to establish the affirmative defenses of easement by necessity or easement implied from prior use. **CDC Pineville, LLC v. UDRT of N.C., LLC, 644.**

Run-off from new development—summary judgment—Summary judgment was correctly granted for two defendants, but not the third, on nuisance and trespass claims arising from water running onto plaintiff's property from a new subdivision. Plaintiff's forecast of evidence was that St. Lawrence's development contributed to the unreasonable increase in the volume of water and that plaintiff's property was damaged by the increased run-off. No such evidence was presented as to the other defendants. **Rainey v. St. Lawrence Homes, Inc., 611.**

TRIAL

Remand—evidence limited to damages—The trial court did not err by limiting the evidence to damages on a hearing after remand of a default judgment. The court made the required findings that defendant had violated the relevant statutes (based on allegations deemed admitted by the default), and those findings were supported by plaintiffs' affidavits as well as evidence introduced at the hearing. Moreover, defendant did not show prejudice. **Blankenship v. Town & Country Ford, Inc., 764.**

UNFAIR TRADE PRACTICES

Fraud—sale of property—The trial court did not err by concluding that defendant's actions of representing that the pertinent property was peaceful and serene and that it did not suffer from trespass problems constituted unfair and deceptive trade practices, because: (1) proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts and the burden shifts to defendant to prove he is exempt from the provisions of N.C.G.S. § 75-1.1; (2) defendant was not engaged in the sale of her own residence; and (3) defendant was motivated by the potential for profit, and she received actual gross profit of \$253,165 from her conduct. **Willen v. Hewson, 714.**

Hiring of branch managers and use of confidential data—misappropriation of trade secrets and unfair practices—lost profits and benefit

UNFAIR TRADE PRACTICES—Continued

received—The trial court did not err by finding that defendant's hiring of plaintiff's branch managers and their use of confidential data proximately caused of plaintiff's damages for misappropriation of trade secrets and unfair and deceptive trade practices. Moreover, under the Unfair and Deceptive Trade Practices Act, lost profits and the benefit defendant received are different types of damages and the award of both is permitted. **Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.**, 49.

Violation of North Carolina's Consumer Finance Act—usurious loans—The trial court did not err by entering summary judgment for plaintiffs on the issue of whether defendants engaged in unfair or deceptive trade practices when Advance Internet customers were required to repay both a cash advance that was purportedly a "rebate" on an internet service contract and an additional fee of at least 20% of the amount of cash received while the internet access that was the ostensible subject of the contract had little or no monetary value. **State ex rel. Cooper v. NCCS Loans, Inc.**, 630.

UNJUST ENRICHMENT

Acceptance of benefit—failure to provide notice—The trial court did not err by concluding plaintiff was not entitled to restitution based on unjust enrichment, because plaintiff failed to provide timely and effective notice to defendant of its contention that defendant caused the damage and of its intention to repaint. Therefore, defendant could not have consciously accepted the benefit of the repainting. **D.W.H. Painting Co. v. D.W. Ward Constr. Co.**, 327.

UTILITIES

Wholesale interstate power contracts—authority of Commission to regulate—The Utilities Commission has the authority under N.C.G.S. § 62-30 and N.C.G.S. § 62-32(b) to require advance submission of wholesale interstate power contracts. The statutes give the Utilities Commission "all powers" necessary to regulate public utilities to ensure that the citizens of North Carolina are provided reasonable service. **State ex rel. Utils. Comm'n v. Carolina Power & Light Co.**, 681.

Wholesale interstate power contracts—Commission order—sufficient for determination of issues—A Utilities Commission order concerning wholesale interstate power contracts was sufficient to allow the Court of Appeals to determine the controverted issues. **State ex rel. Utils. Comm'n v. Carolina Power & Light Co.**, 681.

Wholesale interstate power contracts—regulation—not discriminatory—A regulation requiring notice to the Utilities Commission of wholesale interstate energy contracts was merely burdensome on interstate commerce, and not discriminatory, because it applied equally to wholesale contracts in and out of state. The regulation should therefore be evaluated for whether its effect on interstate commerce is clearly excessive in relationship to putative local benefits. **State ex rel. Utils. Comm'n v. Carolina Power & Light Co.**, 681.

Wholesale interstate power contracts—regulation not overly burdensome—A utilities regulation requiring notice to the Utilities Commission of interstate contracts for wholesaling electric energy is not overly burdensome to inter-

UTILITIES—Continued

state commerce because the local benefit (ensuring the supply of electricity to retail customers) outweighs the interstate burden. **State ex rel. Utils. Comm'n v. Carolina Power & Light Co.**, 681.

VENUE

Action not in county of either party—improper—Venue was not proper where neither party was a resident of the county where the action was filed. On remand, the trial court has no discretion; the action must be moved to the proper county. **Hawley v. Hobgood**, 606.

Nine-month delay between motion to change and hearing—no waiver—A motion for a change of venue was not waived by a nine-month delay between the motion and the notice of hearing where plaintiff did not file additional motions or requests for continuances before filing his notice of hearing. **Hawley v. Hobgood**, 606.

WILLS

Divorced spouse—unchanged will—The language of N.C.G.S. § 31-5.4 clearly mandates that a former spouse is denied any testate disposition unless the testator clearly indicates in the will that he or she would remain a beneficiary even if they divorced. Neither of the provisions of the will cited by the plaintiff in this case so provides, and summary judgment should not have been granted for plaintiff. Although North Carolina has a long-standing policy of avoiding intestate succession, a will cannot be construed to conflict with a clear legislative mandate. **Gibboney v. Wachovia Bank**, 834.

WORKERS' COMPENSATION

Additional medical treatment—presumption—A workers' compensation plaintiff was entitled to the presumption that additional medical treatment for her back injury was directly related to the compensable injury. Although defendant pointed to testimony that it was impossible to say whether plaintiff's back problems were related to the injury, the weight of that testimony is properly determined by the Commission. **Perez v. American Airlines/AMR Corp.**, 128.

Average weekly wage—Commission's determination—sufficiency of evidence—There was competent evidence in a workers' compensation case to support the Industrial Commission's determination of plaintiff's average weekly wage which included an amount for overtime. **Haley v. ABB, Inc.**, 469.

Back injury—future surgery—not void as conditional—The requirement in a workers' compensation order that defendant provide surgery in the future for plaintiff's back injury was supported by medical testimony about plaintiff's need for the surgery. The Commission is specifically authorized by statute to consider the possibility of future medical needs and to provide for them. **Queen v. Penske Corp.**, 814.

Back injury—need for continuing treatment—supporting evidence—There was competent evidence supporting the Industrial Commission's findings in a workers' compensation case that plaintiff's back injury continues and that

WORKERS' COMPENSATION—Continued

his need for further medical treatment is related to that injury. **Queen v. Penske Corp.**, 814.

Carpal tunnel—disability—incapacity for any work—medical evidence inadequate—A workers' compensation disability award for carpal tunnel syndrome was reversed where plaintiff failed to meet her burden under the only prong of *Russell v. Lowes*, 108 N.C. App. 762, applicable to these facts. She did not produce medical evidence that she was physically or mentally incapable of work in any employment. **Terasaka v. AT&T**, 735.

Causation—temporal relationship between accident and injury—The Industrial Commission's finding of causation was supported by competent record evidence where the doctor's opinion was formed by the temporal relation between the accident at work and the injury (there was no problem before the injury and there was a problem afterwards), but he also considered, tested for, and excluded other causes of her condition. **Singletary v. N.C. Baptist Hosp.**, 147.

Defense of claim—reasonableness—Defendant-hospital's defense of a workers' compensation claim was reasonable, and the Industrial Commission did not abuse its discretion by not assessing sanctions against the defendant. **Singletary v. N.C. Baptist Hosp.**, 147.

Claim by deputy sheriff—authority to extinguish county's lien—sovereign immunity—There is specific statutory authority in the Workers' Compensation Act authorizing a deputy sheriff who received both workers' compensation insurance and a third-party settlement to seek a determination of Durham County's authority to file a lien against his settlement proceeds. The trial court did not err by not dismissing the matter under sovereign immunity. **Helsius v. Robertson**, 507.

Compensation prior to second evaluation—back condition as result of leg injury—evidence sufficient—The Industrial Commission did not err by awarding workers' compensation prior to a second medical evaluation where defendant chose the treating doctor that gave plaintiff the disability rating. Further, there was credible evidence supporting the Commission's finding that plaintiff's back condition was a natural and probable result of his compensable leg injury. **Haley v. ABB, Inc.**, 469.

Conflicting medical opinions—weight of evidence—conclusions inconsistent with findings and award—The Industrial Commission was entitled in a workers' compensation case to give greater weight to one of several conflicting medical opinions concerning plaintiff's back injury, and the evidence was sufficient to support the Commission's finding that the plaintiff's leg condition was causally related to his compensable back injury. However, the Commission's conclusions were inconsistent with the findings and the ultimate award (apparently due to clerical error in modifying the Deputy Commissioner's award) and the case was remanded. **Mayfield v. Hanniffin**, 386.

Contact with plaintiff's doctor—limited—A workers' compensation defendant is limited to obtaining information from a plaintiff's physician by one of the methods recognized in the rules or as provided by statutes. In this case, defendant improperly sent plaintiff's doctor a facsimile to obtain evidence for use in a

WORKERS' COMPENSATION—Continued

hearing without plaintiff's consent, and the doctor's opinions rendered after that date were properly excluded. **Mayfield v. Hannifin**, 386.

Denial of claim—reasons valid and sufficiently detailed—Defendant provided valid reasons and sufficient details for denying a workers' compensation claim where defendant was concerned about whether plaintiff was being honest about her condition, and sought to challenge whether plaintiff had developed fibromyalgia and whether that condition was linked to plaintiff's accident at work. **Singletary v. N.C. Baptist Hosp.**, 147.

Disability—causation—evidence sufficient—The Industrial Commission did not err by awarding a 10% permanent disability where there was competent evidence to support a finding that a workers' compensation plaintiff's herniated disc was causally related to her injury. **Perez v. American Airlines/AMR Corp.**, 128.

Disability—extent—sufficiency of evidence—There was competent evidence supporting the extent of a workers' compensation disability through 2 May 2002 where a doctor determined that plaintiff was unable to work and wrote a note excusing her from work until 2 May 2002. **Singletary v. N.C. Baptist Hosp.**, 147.

Disability—extent—sufficiency of evidence—A workers' compensation plaintiff failed to prove disability after 2 May 2002 where her doctor wrote a note excusing her from work until 2 May, but no physician instructed her to remain out of work thereafter. **Singletary v. N.C. Baptist Hosp.**, 147.

Disability—presumption of continuing—same award—A disability finding did not entitle a workers' compensation plaintiff to a presumption of continuing disability in the same award. Showing the existence of a disability did not relieve her from proving the extent of the disability. **Singletary v. N.C. Baptist Hosp.**, 147.

Disc injury—causation—testimony sufficient—The findings and conclusion of the Industrial Commission that a workers' compensation plaintiff's herniated disc was causally related to her compensable injury was supported by competent evidence. **Perez v. American Airlines/AMR Corp.**, 128.

Evidence and credibility—not explained—Although a workers' compensation defendant argued that the Industrial Commission did not consider all of the evidence, the Commission does not have to explain its findings by distinguishing the evidence it finds credible. **Montgomery v. Toastmaster, Inc.**, 320.

Findings—supporting evidence—conclusive—There was evidence to support the Industrial Commission's findings of fact in a workers' compensation case concerning the nature of the employment offered to plaintiff after her injury. Even if there was evidence to the contrary, the Commission's findings are conclusive when supported by competent evidence, and the determination of credibility is the responsibility of the Commission. **Montgomery v. Toastmaster, Inc.**, 320.

Form 26 agreement—alternative favorable remedies—The Industrial Commission did not err in a workers' compensation case by concluding on the date the Form 26 was approved that N.C.G.S. § 97-30 provided a more favorable rem-

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edy than plaintiff received pursuant to N.C.G.S. § 97-31 under the Form 26 agreement based on the Commission's use of the federal minimum wage as plaintiff's earning capacity, because the determination was supported by relevant medical and record evidence. **Lewis v. Craven Reg'l Med. Ctr., 561.**

Improper contact with doctor—shifting treatment—When a doctor's views have been affected by an improper communication from a defendant, the Industrial Commission is entitled to shift the treatment of plaintiff to another physician. **Mayfield v. Hannifin, 386.**

Indemnity compensation—time limitations—Form 60 payments—not a final award—A workers' compensation plaintiff was not barred from further indemnity compensation by the time requirements of N.C.G.S. § 97-47, which limits review of awards to two years from the date of last payment. That statute applies only where there has been a final award; the Form 60 payments here were at most an interlocutory award resolving the issue of compensability but not the nature and extent of any disability. **Perez v. American Airlines/AMR Corp., 128.**

Make-work after injury—part-time, irregular—To prove that a disabled employee is employable, an employer must show that the tendered employment accurately reflects the employee's ability to compete with others in the job market. The Industrial Commission did not err here by concluding that plaintiff was entitled to ongoing temporary total disability where the jobs given to plaintiff were not full-time, regular positions, with similar positions available on the open market. **Montgomery v. Toastmaster, Inc., 320.**

Partial incapacity—postinjury capacity to earn wages—The Industrial Commission did not err in a workers' compensation case by considering plaintiff employee's postinjury capacity to earn wages in calculating benefits for partial incapacity under N.C.G.S. § 97-30 where the employee has not actually returned to work. **Lewis v. Craven Reg'l Med. Ctr., 561.**

Payments for three years after Form 60—estoppel—not addressed—The Industrial Commission erred in a workers' compensation case by failing to address estoppel. It is undisputed that defendants paid plaintiff for three years after the Form 60 before contesting compensability (N.C.G.S. § 97-18(d) requires that the claim be contested within ninety days of the injury). **Lewis v. Beachview Exxon Serv., 179.**

Sanctions and attorney fees—refusal to reinstate compensation and denial of psychological treatment—The Industrial Commission properly awarded sanctions and attorney fees to a workers' compensation plaintiff based upon defendant's refusal to comply with an order to reinstate compensation and its denial of psychological treatment. **Haley v. ABB, Inc., 469.**

Subrogation—statute not unconstitutional—The workers' compensation statute which provides subrogation for a third-party settlement, N.C.G.S. § 97-10.2(j), is not unconstitutionally vague and does not violate due process. Neither does it violate the Exclusive Emoluments prohibition of the N.C. Constitution as to benefits received by deputy sheriffs or in the possibility of a double recovery. **Helsius v. Robertson, 507.**

Testimony from treating physician—tainted by contact with defendant—excluded—The Industrial Commission did not err in a workers' compensation

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proceeding by excluding opinions from plaintiff's treating physician after an ex parte contact from defendant. The advocate's language of the facsimile from defendant was designed to affect the answer and the Commission could reasonably find that the opinion was tainted after the fax. **Mayfield v. Hannifin**, 386.

Third-party settlement—subrogation denied—There was competent evidence supporting findings which themselves supported extinguishing Durham County's subrogation lien on a deputy's workers' compensation benefits, including the finding that petitioner's net recovery would otherwise be zero. The trial court did not abuse its discretion. **Helsius v. Robertson**, 507.

Vocational rehabilitation—release by treating physicians required—The Industrial Commission did not abuse its discretion in a workers' compensation case by denying defendant's request for vocational rehabilitation until plaintiff is released by his treating physicians. **Haley v. ABB, Inc.**, 469.

ZONING

Adult bookstore—variance—The trial court did not err by affirming the Board of Adjustment's denial of a zoning variance to an adult bookstore because the store was too close to a residential area and a public park. Although petitioner contended that the trial court should have considered evidence of the lack of secondary effects from the bookstore, the ordinance conditions the variance on whether specified buffers are present to protect against secondary effects rather considering whether those effects were in fact present. **321 News & Video, Inc. v. Zoning Bd. of Adjust. of Gastonia**, 186.

Cellular telephone tower—public utility station—A cellular telephone company is a "public utility" and a cellular telephone tower is a "public utility station" under the Henderson County Zoning Ordinance. The Henderson County Zoning Board of Adjustment erred as a matter of law by holding otherwise, and the cellular telephone company was entitled to a zoning permit to build its tower in an R-20 zoning district. **BellSouth Carolinas PCS, L.P. v. Henderson Cty. Bd. of Adjust.**, 574.

Definition of facade—alteration of nonconforming sign—An order that a nonconforming sign be removed because more of the facade of the building had been altered than a city zoning ordinance allowed was remanded for determination of a reasonable definition of "facade" consistent with the city's intent in passing the ordinance and with the use of the word throughout the ordinance. The zoning board of adjustment may then determine the extent of facade alteration in this case. **MMR Holdings, LLC v. City of Charlotte**, 540.

Variance—constitutionality of ordinance—not considered—Neither the Board of Adjustment, the superior court, nor the Court of Appeals could consider the constitutionality of a zoning ordinance when deciding whether to grant a variance. The Board had only the authority to grant or deny the variance, and the superior court and Court of Appeals had only the authority to consider whether the variance was properly granted or denied. This is so even if the constitutional argument appears under some other label. **321 News & Video, Inc. v. Zoning Bd. of Adjust. of Gastonia**, 186.

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